CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

Bureau of Customs and Border Protection

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 37 OCTOBER 16, 2003 NO. 42

This issue contains:

DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION

NOTICE

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Bureau of Customs and Border Protection

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 8 2003)

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

SUMMARY: The copyrights, trademarks, and trade names recorded with the Bureau of Customs and Border Protection during the month of August 2003. The last notice was published in the CUSTOMS BULLETIN on August 27, 2003.

Corrections or information to update files may be sent to Department of Homeland Security, Bureau of Customs and Border Protection, Office of Regulations and Rulings, IPR Branch, 1300 Pennsylvania Avenue, N.W., Mint Annex, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: George Frederick McCray, Esq., Chief, Intellectual Property Rights Branch, (202) 572–8710.

Dated: October 8, 2003.

GEORGE FREDRICK MCCRAY, ESQ.
Chief,
Intellectual Property Rights Branch.

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COP0300128	20030826	20230826	TUTU HAIR CLIP, HIBISCUS, #LC981	TRADE WEST INC.	N
COP0300129	20030826	20230826	FIFA WOMEN'S WORLD CUP USA 2003 LOGO	FEDERATION INTERNATIONAL DE FOOT	N
COP0300130	20030826	20230826	FIFA WOMEN'S WORLD CUP 2003 TROPHY	FEDERATION INTERNATIONAL DE FOOT	N
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TMK0300610	20030801	20120924	PREMIERPOINT	SUN COAST MERCHANDISE CORP.	N
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TMK0300612	20030805	20130607	PLAYMATE DESIGN	IGLOO PRODUCTS CORPORATION	N
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TMK0300615	20030805	20140108	THE ORIGINAL PETER RABBIT BOOKS	FREDERICK WARNE & COMPANY INC.	N
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TMK0300632	20030808	20121217	ANTI-GRAVITY	CLINIQUE LABORATORIES, INC.	N
TMK0300633	20030808	20120205	HIGH IMPACT	CLINIQUE LABORATORIES, INC.	N
TMK0300634	20030808	20130408	GLOSSWEAR	CLINIQUE LABORATORIES, INC.	N
TMK0300635	20030811	20091024	SPEAKON	NEUTRIK AKTIENGESELLSCHAFT	N
TMK0300636	20030811	20130318	SIHOUETTED BATTER LOGO DESIGN	MAJOR LEAGUE BASEBALL PROPERTIES	N
TMK0300637	20030811	20120827	SILHOUETTED BATTER LOGO DESIGN	MAJOR LEAGUE BASEBALL PROPERTIES	N
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TMK0300639	20030811	20130128	SILHOUETTED BATTER LOGO DESIGN	MAJOR LEAGUE BASEBALL PROPERTIES	N
TMK0300640	20030811	20121224	SILHOUETTED BATTER LOGO DESIGN	MAJOR LEAGUE BASEBALL PROPERTIES	N
TMK0300641	20030811	20130429	DESIGN	ROSE AMERICA CORPORATION	N
TMK0300642	20030811	20120219	DODGERS AND DESIGN	LOS ANGELES DODGERS INC.	N
TMK0300643	20030811	20120811	TIGERS	LOS ANGELES DODGERS INC.	N
TMK0300644	20030811	20121202	CALADRYL	WARNER-LAMBERT COMPANY	N

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TMK0300646	20030811	20120928	TC (STYLIZED)	MINNESOTA TWINS PARTNERSHIP	N
TMK0300647	20030811	20130128	CONFIGURATION OF A HAND-HELD ELECTRIC DRILL	SNAP-ON TECHNOLOGIES, INC.	N
TMK0300648	20030811	20120723	QUANTUM LEAP	LEAPFROG ENTERPRISES, INC.	N
TMK0300649	20030811	20130311	W WARN WORKS (& DESIGN)	WARN INDUSTRIES, INC.	N
TMK0300650	20030811	20121231	ANAHEIM ANGELS AND DESIGN	ANAHEIM ANGELS L.P.	N
TMK0300651	20030811	20120917	BLUE JAYS WITH DESIGN	ROGERS BLUE JAYS BASEBALL	N
TMK0300652	20030811	20120115	GIANTS AND DESIGN	SAN FRANCISCO BASEBALL ASSOCIATE	N
TMK0300653	20030811	20120629	PADRES	PADRES L.P.	N
TMK0300654	20030811	20120804	SOX (STYLIZED)	CHICAGO WHITE SOX LTD.	N
TMK0300655	20030811	20120331	WHITE SOX	CHICAGO WHITE SOX LTD.	N
TMK0300656	20030811	20090522	SEATTLE MARINERS	THE BASEBALL CLUB OF SEATTLE	N
TMK0300657	20030811	20050110	MONTREAL EXPOS AND DESIGN	BASEBALL EXPOS, L.P.	N
TMK0300658	20030811	20120514	SILHOUETTED BATTER LOGO DESIGN	MAJOR LEAGUE BASEBALL PROPERTIES	N
TMK0300659	20030811	20100306	SAN DIEGO PADERS BASEBALL CLUB AND DESIGN	PADRES L.P.	N
TMK0300660	20030811	20120324	BLUE JAYS	ROGERS BLUE JAYS BASEBALL	N
TMK0300661	20030811	20121008	A'S OAKLAND ATHLETICS AND DESIGN	ATHLETICS INVESTMENT GROUP LLC.	N
TMK0300662	20030811	20121008	M & O KNITS(& DESIGN)	M&O ACTIVEWEAR, INC.	N
TMK0300663	20030811	20090427	PEST OFFENSE	BEST OFFENSE PRODUCTS, INC.	N
TMK0300664	20030811	20130329	ERMENEGILDO ZEGNA	ERMENEGILDO ZEGNA CORPORATION	N
TMK0300665	20030811	20130527	COMPACT DISC REWRITABLE & DESIGN	KONINKLIJKE PHILIPS ELECTRONICS	N
TMK0300666	20030814	20131108	S (STYLIZED)	SPECIALIZED BICYCLE COMPONENTS	N
TMK0300667	20030814	20101007	DESIGN ONLY	HARMAN INT'L. INDUSTRIES, INC.	N
TMK0300668	20030815	20130531	DESIGN ONLY	CMC STEEL FABRICATORS, INC.	N
TMK0300669	20030825	20120430	HARDCORE	BRUNO MASCOLO	N
TMK0300670	20030825	20060416	ENVIROSHAPE	TONI & GUY (USA) LIMITED	N
TMK0300671	20030825	20120604	HEADRUSH	TONI & GUY (USA) LIMITED	N
TMK0300672	20030825	20110605	POWER TRIP	TONI & GUY (USA) LIMITED	N
TMK0300673	20030825	20120205	DESIGN (CONFIGURATION OF A TWO HOLE PAPER PUNCH)	MARTIN YALE INDUSTRIES, INC.	N
TMK0300674	20030825	20120129	DESIGN (CONFIGURATION OF A TWO HOLE PAPER PUNCH)	MARTIN YALE INDUSTRIES, INC.	N
TMK0300675	20030825	20130311	MAX-FIT	THE MOORE COMPANY	N
TMK0300676	20030825	20040522	TILEX	THE CLOROX COMPANY	N
TMK0300677	20030825	20121224	GAME BOY ADVANCE	NINTENDO OF AMERICA INC.	N
TMK0300678	20030825	20121224	MANDISA & DESIGN	MANDISA, INC.	N
TMK0300679	20030825	20121224	MANDISA & DESIGN	MANDISA, INC.	N
TMK0300680	20030825	20090821	ACTIVATOR	ACTIVATOR METHODS INT'L., LTD.	N
TMK0300681	20030825	20131020	QUAD	QUADION CORPORATION	N
TMK0300682	20030825	20111218	LEGACY CLASSIC FURNITURE	LEGACY CLASSIC FURNITURE, INC.	N
TMK0300683	20030826	20130608	PADRON CIGARS HAND MADE MIAMI, FLA. PPPP & DESIGN	PILOTO CIGARS INC.	N
TMK0300684	20030826	20121112	MISH MASH	TOO BRANDS INVESTMENT LLC.	N
TMK0300685	20030826	20130726	LE SPORTSAC & DESIGN	LE SPORTSAC, INC.	N
TMK0300686	20030826	20130610	MONTANA	UNITED COMPANY FOR FOOD INDUSTRY	N
TMK0300687	20030826	20121105	FIFA WORLD CUP	FEDERATION INTERNATIONAL DE FOOT	N

SUBTOTAL RECORDATION TYPE 78

TOTAL RECORDATIONS ADDED THIS MONTH 89

FEE FOR CUSTOMS SERVICES AT USER FEE AIRPORTS

AGENCY: Bureau of Customs and Border Protection, DHS.

ACTION: General notice.

SUMMARY: This document advises the public of an increase in the fees charged user fee airports by the Bureau of Customs and Border Protection (CBP) for providing customs services at these designated facilities. These fees are based on actual costs incurred by CBP for equipment, training, and one CBP inspector on a full-time basis, and, thus, merely represent reimbursement to CBP for services rendered. The fees to be increased are the initial fee charged for a user fee airport's first year after it signs a Memorandum of Agreement with CBP to become a user fee airport, and the annual fee thereafter charged user fee airports.

EFFECTIVE DATE: The new fees will be effective October 1, 2003, and will be reflected in quarterly, user fee airport billings issued on or after that date.

FOR FURTHER INFORMATION CONTACT: Cynthia Sargent, Office of Finance (202) 927–0609.

SUPPLEMENTARY INFORMATION:

Background

Section 236 of the Trade and Tariff Act of 1984 (Public Law 98–573, 98 Stat. 2992) (codified at 19 U.S.C. 58b), as amended, authorizes the provision of customs services and establishment of a fee for the use of such services at certain specified airports and at any other airport, seaport, or other facility designated pursuant to specified criteria. (The list of user fee airports is found at § 122.15 of the Customs Regulations (19 CFR 122.15)). The fee that is charged is an amount equal to the expenses incurred in providing the customs services at the designated facility, which includes the salary and expenses of individuals employed by CBP, and any necessary support costs to provide the customs services. The fees being raised are the initial fee charged for a user fee airport's first year after it signs a Memorandum of Agreement with CBP to become a user fee airport (set at $129,125 for FY 2003), and the annual fee, thereafter, charged user fee airports (set at $115,400 for FY 2003).

The user fees for user fee airports are typically set forth in Memorandum of Agreements between the user fee facility and CBP. While the amounts of these fees are agreed to be at flat rates, they are adjustable, as costs and circumstances change.

The last notice concerning fees charged user fee airports was published on September 12, 2002, in the Federal Register (67 FR 57866).

Adjustment of User Fee Airport Fees

As of July 24, 2003, CBP has determined that in order for the user fee to fully reimburse CBP for services provided, the initial fee must be increased from $129,125 to $140,874 and that the recurring annual fee subsequently charged must be increased from $115,400 to $123,438. The new fees will be effective October 1, 2003, and will be reflected in quarterly, user fee airport billings issued on or after that date.

Dated: September 26, 2003

JOHN E. EICHELBERGER,
Assistant Commissioner,
Office of Finance.

Overtime Billing for Customs Inspectional Services; Expiration of User Fee Law

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This document notifies the public that the customs user fee law (19 U.S.C. 58c) is set to expire as of midnight September 30, 2003. Congress may extend the law by that date, in which case nothing will change with respect to the collection of customs user fees. The Bureau of Customs and Border Protection (CBP) is publishing this notice to keep the public fully informed of the fees that CBP will collect in the event the law is not extended. Inspectional fees collected by the Agriculture, Plant and Health Inspection Service under 21 U.S.C. 136a and 49 U.S.C. 80503 and by CBP under 8 U.S.C. 1356 will be unaffected.

EFFECTIVE DATES: In the event that the customs user fee law expires at midnight September 30, 2003, the billing procedures identified in this document will take effect beginning October 1, 2003, and will be reflected in quarterly bills issued after that date. In the event that the customs user fee law is extended prior to midnight September 30, 2003, nothing will change with respect to the collection of customs user fees. In the event that the user fee law is extended any time after midnight September 30, 2003, the procedures identified in this document will cease to be applicable at that time and the procedures under the user fee law will be reinstated at that time in accordance with the provisions of the extension.

FOR FURTHER INFORMATION CONTACT: Edward Matthews, Office of Finance (202) 927–0552.

SUPPLEMENTARY INFORMATION:

Background

The Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985 (P.L. 99–272), as amended (codified at 19 U.S.C. 58c; hereafter, section 58c), authorized the U.S. Customs Service (now the Bureau of Customs and Border Protection and hereafter referred to as CBP) to collect fees for processing services by agency personnel relative to the following matters: (1) the arrival in the United States of commercial vessels; (2) the arrival of commercial trucks; (3) the arrival of rail cars; (4) the arrival of private vessels and aircraft; (5) the arrival of air and sea passengers; (6) dutiable mail packages; (7) customs broker permits; (8) the arrival of barges and bulk carriers from Canada or Mexico; and (9) and (10) imported merchandise. (See 19 U.S.C. 58c(1) through (10).) Under section 58c, CBP collects these fees and deposits them into the Customs User Fee Account. Monies from this account are designated to reimburse CBP for overtime compensation, premium pay, benefits on overtime, excess preclearance services, and foreign language proficiency awards.

Under section 58c(e)(6), during the period when the fees of section 58c(a) are authorized, no fees other than the fees of 58c(a) may be imposed for:

i. Cargo inspection, clearance, or other customs activity expense, or services performed;

ii. Agency personnel provided, in connection with the arrival or departure of any commercial vessel, vehicle, or aircraft, or its passengers, crew, stores, material, or cargo, in the United States;

iii. For any preclearance or other agency activity, expense, or service performed, and any personnel provided outside the United States in connection with the departure of any commercial vessel, vehicle, or aircraft, or its passengers, crew, stores, material, or cargo, for the United States;

iv. Any activation or operation (including agency supervision) of any foreign trade zone or subzone established under the Act of June 18, 1934; or

v. The designation or operation (including agency supervision) of any bonded warehouse under 19 U.S.C. 1555.

Under section 58c(j)(3), the fees set forth under section 58c(a) cannot be charged after September 30, 2003. If the customs user fee law is extended prior to midnight September 30, 2003, nothing will change with respect to the collection of customs user fees. If the customs user fee law is allowed to expire, CBP, effective on October 1, 2003, will bill the party in interest for requested special services un-

der 19 CFR 24.17 and 24.18, pursuant to the authority of 31 U.S.C. 9701. CBP estimates that excess preclearance services, overtime billing for air passenger services, and overtime billing for sea passenger services in fiscal year 2004 will be $11,000,000, $53,500,000, and $5,300,000, respectively. The amounts to be recovered for other services are not readily available.

If the user fee law is extended anytime after implementation of the above fee collections authorized under 31 U.S.C. 9701 on October 1, 2003, fee collection under that statute will be discontinued and fee collection under section 58c will be resumed at that time.

CBP notes that inspectional fees collected by the Agriculture, Plant and Health Inspection Service (APHIS) under 21 U.S.C. 136a (relating to the agricultural quarantine inspection user fee) and 49 U.S.C. 80503 (relating to payments for inspection and quarantine services) will continue to be collected by that agency. Also, the immigration inspectional fees that CBP now collects under 8 U.S.C. 1356 (relating to passengers arriving in the United States on commercial vessels or aircraft), which had been collected by the legacy Immigration and Naturalization Service prior to its transfer to CBP effective on March 1, 2003, will continue to be collected by CBP.

Dated: September 25, 2003

CAROL A. DUNHAM,
Acting Assistant Commissioner,
Office of Finance.

Public Meeting of the Airport and Seaport User Fee Advisory Committee

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of meeting.

SUMMARY: This document announces the date, time, and location for a public meeting of the Airport and Seaport User Fee Advisory Committee and the agenda for consideration by the Committee. It also invites submission of written statements. In order to be considered for discussion at the meeting, a statement must be received by the Committee at least five days prior to the date of the meeting.

DATE: The 26th meeting of the Airport and Seaport User Fee Advisory Committee will be held on Wednesday, October 22, 2003, at 1:00 p.m., at the Office of Field Operations, Bureau of Customs and Border Protection, 5th Floor Bridge Conference Room, International Trade Center, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Cynthia Sargent, Office of Finance, (202) 927–0609; email: cynthia.sargent@dhs.gov.

SUPPLEMENTARY INFORMATION:

Background

The Airport and Seaport User Fee Advisory Committee was created under the authority of 8 U.S.C. 1356(k) (section 286(k) of the Immigration and Nationality Act, as amended; see also the Federal Advisory Committee Act (5 U.S.C.A. App. § 2)) to meet periodically and advise the Attorney General on issues related to the performance of certain inspectional services performed by the Immigration and Naturalization Service (INS). Since the legacy INS inspection component has been merged with the U.S. Customs Service (along with other agencies) to form the Bureau of Customs and Border Protection (CBP), effective on March 1, 2003, the function of the Committee is now under CBP and the Committee now advises the Secretary of Homeland Security.

The Committee consists of representatives of the airline and other transportation industries that are subject to fees and charges authorized by law or proposed by the governing agency (either INS prior to March 1, 2003, or CBP afterward). Matters of consideration by the Committee include time periods during which inspectional services should be performed, number and deployment of inspectional officers, the level of fees, and the appropriateness of any proposed fee. The fees addressed by the Committee are immigration fees and should not to be confused with COBRA fees authorized under 19 U.S.C. 58c.

Generally, the Committee focuses its attention on those subjects that most concern and benefit the travel industry, the traveling public, and CBP. One such subject is the fee charged for immigration inspectional services under 8 U.S.C. 1356(d) (section 286(d) of the Immigration and Nationality Act, as amended). This fee applies to each passenger arriving at a port of entry in the United States, or to the preinspection of a passenger in a place outside the United States prior to arrival in the United States, aboard a commercial aircraft or vessel.

Public Meeting

In accordance with 8 U.S.C. 1356(k), CBP announces that the twenty-sixth meeting of the Airport and Seaport User Fee Advisory Committee will take place at 1:00 p.m. on October 22, 2003, at CBP Headquarters, Office of Field Operations, 5th Floor Bridge Conference Room, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. The meeting is open to the public, and advance notice of attendance is requested to ensure adequate seating. Persons planning to attend should notify the contact person identified previously in

this notice at least five days prior to the meeting. Any interested party may submit a written statement at any time before or after the meeting to the contact person for consideration by the Committee. Written statements received by the contact person at least five days prior to the meeting will be considered for discussion at the meeting.

Meeting Agenda

At this meeting, the Committee is expected to pursue the following agenda (which may be modified prior to the meeting):

1. Introduction of the Committee members;
2. Discussion of administrative issues;
3. Discussion of activities since last meeting;
4. Discussion of specific concerns and questions of Committee members;
5. Discussion of future traffic trends;
6. Discussion of relevant written statements timely submitted by the public in advance of the meeting (as above); and
7. Scheduling of next meeting.

Dated: September 26, 2003

JOHN E. EICHELBERGER,
Assistant Commissioner,
Office of Finance.

Department of the Treasury

19 CFR PART 191

RIN 1515–AD32

MERCHANDISE PROCESSING FEES ELIGIBLE TO BE CLAIMED AS CERTAIN TYPES OF DRAWBACK BASED ON SUBSTITUTION OF FINISHED PETROLEUM DERIVATIVES

AGENCY: Customs and Border Protection, Homeland Security;

ACTION: Notice of Proposed Rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations to provide that merchandise processing fees are eligible to be claimed, in limited circumstances, as drawback based on substitution of finished petroleum derivatives. The proposed amendments are consistent with a court decision in which merchandise processing fees were found to be eligible to be claimed as unused merchandise drawback. As drawback based on substitution of finished petroleum derivatives is, in limited circumstances, treated in the same manner as unused merchandise drawback, the amendments to the Customs Regulations proposed in this document reflect that merchandise processing fees are also eligible to be claimed as drawback in these circumstances.

DATE: Comments must be received on or before December 1, 2003.

ADDRESS: Written comments may be submitted to Bureau of Customs and Border Protection, Office of Regulations & Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue N.W., Washington, D.C. 20229. Submitted comments may be inspected at Bureau of Customs and Border Protection, 799 9th Street, N.W., Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: William G. Rosoff, Chief, Duty and Refund Determinations Branch, Office of Regulations and Rulings, Bureau of Customs and Border Protection, Tel. (202) 572–8807.

SUPPLEMENTARY INFORMATION:

Background

Merchandise Processing Fees

Merchandise processing fees are fees charged and collected for the processing of merchandise that is formally entered or released into

the United States. See 19 U.S.C. 58c(a)(9)(A). Merchandise processing fees are assessed as a percentage of the value of the imported merchandise, as determined under 19 U.S.C. 1401a.

Merchandise Processing Fees Eligible to be Claimed as Drawback

Section 313 of the Tariff Act of 1930, as amended, (19 U.S.C. 1313), concerns drawback and refunds. Drawback is a refund of certain duties, taxes and fees paid by the importer of record and granted to a drawback claimant under specific conditions.

In Texport Oil v. United States, 185 F.3d 1291 (Fed. Cir. 1999), the Court of Appeals for the Federal Circuit (CAFC) held that merchandise processing fees were assessed under Federal law and imposed by reason of importation and therefore eligible to be claimed as unused merchandise drawback pursuant to 19 U.S.C. 1313(j).

Subsection (p) of 19 U.S.C. 1313 authorizes drawback that is based on "substitution of finished petroleum derivatives." Subsection (p)(4)(B) of 19 U.S.C. 1313, in pertinent part, limits the amount of drawback payable under this subsection to the amount of drawback that would be attributable to the article "if imported under [subsection 1313(p)(2)(A)(iii) or (iv)] had the claim qualified for drawback under subsection (j)." [emphasis added]

Subsection 1313(p)(2)(A)(iii) requires that the exporter of the exported article had imported the qualified article in a quantity equal to or greater than the quantity of the exported article. Subsection 1313(p)(2)(A)(iv) requires that the exporter of the exported article had purchased or had exchanged, directly or indirectly, an imported qualified article from an importer in a quantity equal to or greater than the quantity of the exported article.

The language "had the claim qualified for drawback under subsection (j)" reflects that drawback is payable under 1313(p)(2)(A)(iii) or (iv) pursuant to the same formula set forth in subsection 1313(j), i.e., the amount of drawback payable under 19 U.S.C. 1313(j) is not to exceed 99 percent of any duty, tax, or fee imposed under Federal law because of the imported article's importation. It is noted that "drawback payable" pursuant to 19 U.S.C. 1313(p)(2)(A)(iii) or (iv) includes merchandise processing fees.

It follows, therefore, that as the CAFC has determined that merchandise processing fees are eligible to be claimed as drawback pursuant to 19 U.S.C. 1313(j), such fees are also eligible to be claimed as drawback when drawback is based on substitution of finished petroleum derivatives pursuant to 19 U.S.C. 1313(p)(2)(A)(iii) or (iv).

Proposed Amendments to the Customs Regulations

The Texport Oil decision is reflected in the Customs Regulations at §§ 191.3 and 191.51. See 67 FR 48547 (July 25, 2002), in which a fi-

nal rule was published amending the Customs Regulations to reflect that merchandise processing fees are eligible to be claimed as unused merchandise drawback pursuant to 19 U.S.C. 1313(j).

In order to reflect that the court's holding is applicable, in limited circumstances, to drawback based on substitution of finished petroleum derivatives, this document proposes to further amend the Customs Regulations.

EXPLANATION OF AMENDMENTS

It is proposed to amend §§ 191.3(a)(4), 191.3(b)(2), 191.51(b)(2) and 191.171 of the Customs Regulations (19 CFR 191.3, 191.51 and 191.171) to provide that merchandise processing fees are eligible to be claimed as drawback when the basis for drawback is the substitution of finished petroleum derivatives pursuant to 19 U.S.C. 1313(p)(2)(A)(iii) or (iv). A more detailed explanation of the proposed amendments is set forth below.

Amendment to § 191.3 of the Customs Regulations

Section 191.3(a)(4) of the Customs Regulations provides that merchandise processing fees for unused merchandise drawback pursuant to 19 U.S.C. 1313(j) are subject to drawback. As merchandise processing fees are eligible to be claimed as drawback for substitution of finished petroleum derivatives pursuant to 19 U.S.C. 1313(p)(2)(A)(iii) or (iv), it is proposed to amend § 191.3(a)(4) accordingly.

Conversely, § 191.3(b)(2) of the Customs Regulations lists the types of duties and fees that are not subject to drawback, and specifically excepts merchandise processing fees where unused merchandise drawback is claimed. For the reasons stated above, it is proposed that this provision be amended to include an exception for merchandise processing fees where drawback is claimed for substitution of finished petroleum derivatives pursuant to 19 U.S.C. 1313(p)(2)(A)(iii) or (iv).

Amendment to § 191.51

Section § 191.51(b)(2) of the Customs Regulations sets forth the apportionment calculation to be used when determining the amount of merchandise processing fee eligible for drawback. It is proposed to amend § 191.51(b)(2) to include reference to drawback for substitution of finished petroleum derivatives pursuant to 19 U.S.C. 1313(p)(2)(A)(iii) or (iv).

Amendment to § 191.171

Finally, it is proposed to amend § 191.171 of the Customs Regulations, which describes the drawback allowance for substitution of finished petroleum derivatives, to add a new subsection (c) which sets forth the conditions when merchandise processing fees will be eligible for drawback pursuant to 19 U.S.C. 1313(p)(2)(A)(iii) or (iv).

COMMENTS

Before adopting this proposal as a final rule, consideration will be given to any written comments timely submitted to CBP, including comments on the clarity of this proposed rule and how it may be made easier to understand. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552) and § 103.11(b) of the Customs Regulations (19 CFR § 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, Bureau of Customs and Border Protection, 799 9th St., N.W., Washington, D.C. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Because these proposed regulatory changes conform the Customs Regulations to reflect the full scope of a recent decision by the Court of Appeals for the Federal Circuit, pursuant to the provisions of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., it is certified that, if adopted, the proposed amendments will not have a significant impact on a substantial number of small entities. Further, these proposed amendments do not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

DRAFTING INFORMATION

The principal author of this document was Ms. Suzanne Kingsbury, Office of Regulations and Rulings, Bureau of Customs and Border Protection. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 191

Claims, Commerce, Customs duties and inspection, Drawback.

PROPOSED AMENDMENTS TO THE REGULATIONS

For the reasons stated above, it is proposed to amend part 191 of the Customs Regulations (19 CFR part 191) as follows:

PART 191 — DRAWBACK

1. The general authority citation for part 191 continues to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 23, Harmonized Tariff Schedule of the United States), 1313, 1624.

2. Section 191.3(a)(4) and (b)(2) are revised and the introductory texts of paragraph (a) and (b) are republished to read as follows:

§ 191.3 Duties and fees subject or not subject to drawback.

(a) Duties and fees subject to drawback include:

* * *

(4) Merchandise processing fees (see § 24.23 of this chapter) for merchandise subject to unused merchandise drawback pursuant to 19 U.S.C. 1313(j), or merchandise subject to drawback for substitution of finished petroleum derivatives pursuant to 19 U.S.C. 1313(p)(2)(A)(iii) or (iv).

(b) Duties and fees not subject to drawback include:

* * *

(2) Merchandise processing fees (see § 24.23 of this chapter), except where unused merchandise drawback pursuant to 19 U.S.C. 1313(j) or drawback for substitution of finished petroleum derivatives pursuant to 19 U.S.C. 1313(p)(2)(A)(iii) or (iv) is claimed; and

* * * * *

3. In § 191.51, paragraph (b)(2) is revised to read as follows:

§ 191.51 Completion of drawback claims.

* * * * *

(b) Drawback due.

* * *

(2) Merchandise processing fee apportionment calculation. Where a drawback claimant seeks unused merchandise drawback pursuant to 19 U.S.C. 1313(j), or drawback for substitution of finished petroleum derivatives pursuant to 19 U.S.C. 1313(p)(2)(A)(iii) or (iv), for a merchandise processing fee paid pursuant to 19 U.S.C. 58c(a)(9)(A), the claimant is required to correctly apportion the fee to that merchandise that provides the basis for drawback when calculating the amount of drawback requested on the drawback entry. This is determined as follows:

* * * * *

4. In § 191.171, a new paragraph (c) is added to read as follows:

§ 191.171 General; Drawback allowance.

* * * * *

(c) Merchandise processing fees. In cases where the requirements of paragraph (b)(1) of this section have been met, merchandise processing fees will be eligible for drawback.

ROBERT C. BONNER,
Commissioner,
Customs and Border Protection.

Approved: September 26, 2003

Deputy Assistant Secretary of the Treasury
Timothy E. Skud

[Published in the Federal Register, (October 2, 2003) 68 FR 56804)]

19 CFR PART 10

(CBP Dec. 03–29)

RIN 1515–AD24

PREFERENTIAL TREATMENT OF BRASSIERES UNDER THE CARIBBEAN BASIN ECONOMIC RECOVERY ACT

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: Interim regulations; solicitation of comments.

SUMMARY: This document sets forth interim amendments to one of the provisions of the Customs Regulations that implement the trade benefits for Caribbean Basin countries contained in section 213(b) of the Caribbean Basin Economic Recovery Act (the CBERA). The interim regulatory amendments involve the brassieres provision of section 213(b) and primarily reflect changes made to that statutory provision by section 3107 of the Trade Act of 2002. The specific statutory changes addressed in this document involve the minimum U.S. material content requirements that apply for purposes of preferential treatment of brassieres under the CBERA. This document also includes a number of other changes to the CBERA implementing regulations for brassieres to clarify a number of issues that arose after their original publication.

DATES: Interim rule effective September 30, 2003. Comments must be submitted by December 1, 2003.

ADDRESSES: Written comments are to be addressed to the Bureau of Customs and Border Protection, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue N.W., Washington, D.C. 20229. Submitted comments may be inspected at the Bureau of Customs and Border Protection, 799 9th Street N.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT:

Operational issues: Robert Abels, Office of Field Operations (202–927–1959).

Legal issues: Cynthia Reese, Office of Regulations and Rulings (202–572–8790).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Textile and Apparel Articles Under The Caribbean Basin Economic Recovery Act

The Caribbean Basin Economic Recovery Act (the CBERA, also referred to as the Caribbean Basin Initiative, or CBI, statute, codified at 19 U.S.C. 2701–2707) instituted a duty preference program that applies to exports of goods from those Caribbean Basin countries that have been designated by the President as program beneficiaries. On May 18, 2000, the President signed into law the Trade and Development Act of 2000, Public Law 106–200, 114 Stat. 251, which included as Title II the United States-Caribbean Basin Trade Partnership Act, or CBTPA. The CBTPA provisions included section 211 which amended section 213(b) of the CBERA (19 U.S.C. 2703(b)) in order to, among other things, provide in new paragraph (2) for the preferential treatment of certain textile and apparel articles, specified in subparagraph (A), that had previously been excluded from the CBI duty-free program. The preferential treatment for those textile and apparel articles under paragraph (2)(A) of section 213(b) involves not only duty-free treatment but also entry in the United States free of quantitative restrictions, limitations, or consultation levels. Paragraph (2)(A) of the statute includes, in clause (iv), a specific provision covering brassieres from designated CBTPA beneficiary countries.

On October 2, 2000, the President signed Proclamation 7351 to implement the provisions of the CBTPA. This Proclamation, which was published in the **Federal Register** (65 FR 59329) on October 4, 2000, modified the Harmonized Tariff Schedule of the United States (HTSUS) by, among other things, the addition of a new Subchapter XX to Chapter 98 to address the majority of the textile and apparel provisions of the CBTPA. Within that Subchapter XX, the brassieres provision of paragraph (2)(A)(iv) of the CBTPA statute is dealt with in U.S. Note 2(d) and in subheading 9820.11.15.

On October 5, 2000, the U.S. Customs Service (now the Bureau of Customs and Border Protection (CBP)) published in the **Federal Register** (65 FR 59650) T.D. 00–68 to amend the Customs Regulations on an interim basis in order to set forth basic legal requirements and procedures that apply for purposes of obtaining preferential treatment of textile and apparel articles pursuant to the provisions added to section 213(b) by the CBTPA. Those interim regulations, consisting of §§ 10.221 through 10.227 of the Customs Regulations (19 CFR 10.221 through 10.227), include, in paragraph (a) of § 10.223, a list of the various groups of articles that are eligible for preferential treatment under the statute. Paragraph (a)(6) of § 10.223 specifically addressed the basic CBTPA brassieres provision of subclause (I) of paragraph (2)(A)(iv) of the statute and subheading 9820.11.15 of the HTSUS. The regulatory texts set forth in T.D. 00–68 did not address subclauses (II) and (III) of paragraph (2)(A)(iv) of the statute and U.S. Note 2(d) of Subchapter XX, Chapter 98, HTSUS, because under the terms of the statute those provisions applied only to articles entered on or after October 1, 2001.

On October 4, 2001, CBP (as legacy Customs) published in the **Federal Register** (66 FR 50534) T.D. 01–74 to amend the Customs Regulations on an interim basis in order to implement the terms of subclauses (II) and (III) of paragraph (2)(A)(iv) of the statute and U.S. Note 2(d) of Subchapter XX, Chapter 98, HTSUS. Those regulatory amendments involved primarily the addition of a new § 10.228 which set forth specific rules for the application of the minimum 75 and 85 percent U.S. fabric component content requirements under subclauses (II) and (III) that took effect for purposes of preferential treatment of brassieres described in subclause (I) starting on October 1, 2001.

Trade Act of 2002 amendments

On August 6, 2002, the President signed into law the Trade Act of 2002 (the "Act"), Public Law 107–210, 116 Stat. 933. Section 3107(a) of the Act made a number of changes to the textile and apparel provisions of paragraph (2)(A) of section 213(b) of the CBERA. The amendments made by section 3107(a) of the Act included a revision of the brassieres provisions of paragraph (2)(A)(iv) of the statute which involved the following textual changes: (1) subclause (I) was amended by the addition of exception language regarding articles covered by certain other clauses under paragraph (2)(A); and (2) subclauses (II) and (III) were amended by replacing each reference to "fabric components" with "fabrics," by adding exclusion language regarding findings and trimmings after each reference to fabric(s), and by adding various references to articles that are "entered" and that are "eligible" under clause (iv). The principal effects of the language changes within subclauses (II) and (III) were: (1) adoption of a cost or value percentage standard based on a comparison between

U.S. fabric and all fabric (rather than based on a comparison between U.S. fabric components and all fabric) contained in the articles; and (2) removal of the requirement that the articles must be both produced and entered in the same year. The amended paragraph (2)(A)(iv) text now reads as follows:

> (iv) CERTAIN OTHER APPAREL ARTICLES.—(I) GENERAL RULE.—Subject to subclause (II), any apparel article classifiable under subheading 6212.10 of the HTS, except for articles entered under clause (i), (ii), (iii), (v), or (vi), if the article is both cut and sewn or otherwise assembled in the United States, or one or more CBTPA beneficiary countries, or both.
>
> (II) LIMITATION.—During the 1-year period beginning on October 1, 2001, and during each of the 6 succeeding 1-year periods, apparel articles described in subclause (I) of a producer or an entity controlling production shall be eligible for preferential treatment under subparagraph (B) only if the aggregate cost of fabrics (exclusive of all findings and trimmings) formed in the United States that are used in the production of all such articles of that producer or entity that are entered and eligible under this clause during the preceding 1-year period is at least 75 percent of the aggregate declared customs value of the fabric (exclusive of all findings and trimmings) contained in all such articles of that producer or entity that are entered and eligible under this clause during the preceding 1-year period.
>
> (III) DEVELOPMENT OF PROCEDURE TO ENSURE COMPLIANCE.—The United States Customs Service shall develop and implement methods and procedures to ensure ongoing compliance with the requirement set forth in subclause (II). If the Customs Service finds that a producer or an entity controlling production has not satisfied such requirement in a 1-year period, then apparel articles described in subclause (I) of that producer or entity shall be ineligible for preferential treatment under subparagraph (B) during any succeeding 1-year period until the aggregate cost of fabrics (exclusive of all findings and trimmings) formed in the United States that are used in the production of such articles of that producer or entity entered during the preceding 1-year period is at least 85 percent of the aggregate declared customs value of the fabric (exclusive of all findings and trimmings) contained in all such articles of that producer or entity that are entered and eligible under this clause during the preceding 1-year period.

On November 13, 2002, the President signed Proclamation 7626 (published in the **Federal Register** at 67 FR 69459 on November 18, 2002) which included, among other things, modifications to the HTSUS to implement the changes to section 213(b)(2)(A) of the

CBERA made by section 3107(a) of the Act. Those modifications included an amendment of U.S. Note 2(d) to Subchapter XX, Chapter 98, HTSUS, to reflect the changes to subclauses (II) and (III) of paragraph (2)(A)(iv) of the statute discussed above. The Proclamation further provided that this amendment of U.S. Note 2(d) was effective with respect to goods entered, or withdrawn from warehouse for consumption, on or after October 1, 2002.

Changes to the interim regulatory texts

As a consequence of the statutory amendments described above and as a result of the modifications to the HTSUS made by Proclamation 7626, the interim regulatory provisions published in T.D. 01–74 no longer reflect the current standards that apply for purposes of preferential treatment of brassieres under the CBERA. CBP notes in this regard that the effect of the statutory changes requires changes throughout the text of interim § 10.228. Moreover, following publication of T.D. 01–74, some other issues came to the attention of CBP that warrant additional changes to the interim § 10.228 text.

Accordingly, this interim rule document revises interim § 10.228 in its entirety to reflect the amendments to the statute and to clarify or otherwise improve the previously published text. This document is limited to the text of interim § 10.228 and therefore does not address the change that the Act made to paragraph (2)(A)(iv)(I) of the statute; that provision was reflected in § 10.223(a)(6) within the interim CBTPA regulations published in T.D. 00–68 referred to above and is discussed in a separate interim rule document that addresses the other statutory changes to the CBERA made by the Act.

It is the intention of CBP, after the close of the public comment period prescribed in this document, to publish one final rule document that addresses the revised § 10.228 provisions contained in this document and the other regulatory changes pertaining to brassieres under the CBTPA that were published in T.D. 01–74. That final rule document will summarize and respond to the public comments previously submitted on the changes to § § 10.222 and 10.223(a)(7) published in T.D. 01–74 and will also address any comments submitted on the revised § 10.228 text set forth in this document. Because CBP has significantly modified § 10.228 in this document, CBP will not consider or address any public comments previously submitted on the text of § 10.228 as published in T.D. 01–74 that have been addressed by statutory changes. Any other comments previously submitted will be addressed. If a member of the public wishes to have CBP consider a new issue involving § 10.228, a new comment setting forth that issue may be submitted in accordance with the comment procedures prescribed in this document.

The interim regulatory changes to § 10.228 contained in this document are discussed below.

Amendments to reflect the statutory changes

The changes to § 10.228 set forth in this document that are in response to the changes made to paragraph (2)(A)(iv) of the statute by section 3107(a) of the Act are as follows:

1. The definition of "fabric components formed in the United States" in paragraph (a)(3) has been replaced by a definition of "fabrics formed in the United States" to reflect the fact that subclauses (II) and (III) of the statute no longer refer to fabric "components." Similarly, the definition of "cost" in paragraph (a)(4) and the definition of "declared customs value" in paragraph (a)(5) have been modified to refer simply to "fabrics."

2. The following changes have been made to paragraph (b) which concerns the 75/85 percent U.S. fabric content requirements for preferential treatment in subclauses (II) and (III) of the statute:

a. In the introductory text of paragraph (b)(1), reference is made to the year that begins on "October 1, 2002" (rather than "October 1, 2001") to reflect the applicable effective date set forth in Proclamation 7626.

b. Throughout the paragraph (b) texts, all references to U.S.-formed "fabric components" have been replaced by references to U.S.-formed "fabric," the words "produced and" have been removed from the expression "produced and entered," and the parenthetical reference "(exclusive of all findings and trimmings)" has been added as appropriate after references to "fabrics" and "fabric." These changes simply conform the regulatory text to the wording changes in the statute.

c. Paragraph (b)(1)(i), which concerns the 75 percent requirement of subclause (II) of the statute, has been changed to refer to articles that are "entered as articles described in § 10.223(a)(6)," and paragraph (b)(1)(ii), which concerns the 85 percent requirement of subclause (III) of the statute, has been changed to refer to articles that "conform to the production standards set forth in § 10.223(a)(6)." These wording changes are in response to the statutory wording changes regarding articles that are "entered" and that are "eligible" under clause (iv). The differences in wording in the two regulatory texts are necessary in order to enable the 85 percent standard to operate. CBP notes in this regard that if the universe of articles that are looked at for purposes of assessing compliance with the 85 percent standard is the same as that used for purposes of the 75 percent standard (that is, articles that were entered under the HTSUS subheading that applies to articles described in paragraph (2)(A)(iv)(I) of the statute and § 10.223(a)(6)), it would be impossible in the first year following the statutory changes (that is, starting on October 1, 2002) for a new producer or entity to enter the program, or for a producer or entity that failed to meet the 75 percent standard in the previous year to reenter the program. This is because application of the 85 percent standard presupposes a failure to have

met the 75 percent standard in the preceding year, in which case there could not be any entries in the next year under the HTSUS subheading that applies to articles described in paragraph (2)(A)(iv)(I) of the statute and § 10.223(a)(6) against which compliance with the 85 percent standard can be determined. The wording used in paragraph (b)(1)(ii) of the regulatory text (which is also reflected in the general statement of the paragraph (b)(1) introductory text and in the general rule in paragraph (b)(2)(i)(A)), by referring to articles that meet the U.S./Caribbean cutting and assembly production requirement (regardless of the HTSUS subheading under which they are entered), is intended to avoid this anomalous result.

d. In the general rules of application set forth in paragraph (b)(2)(i), two new subparagraphs (C) and (D) have been added to clarify the application of the different regulatory language for the 75 and 85 percent standards discussed at point c. above, and former subparagraph (D) has been removed because it concerned the year of production which is no longer relevant under the amended statutory text.

e. Also in paragraph (b)(2)(i), former subparagraph (C) has been redesignated as subparagraph (E) and the text has been modified, and a new subparagraph (L) has been added, primarily to reflect that the findings and trimmings referred to in the context of brassieres are not limited to foreign findings and trimmings.

f. Also in paragraph (b)(2)(i), former subparagraph (E) has been redesignated as subparagraph (G) and the text, which concerns a new producer or new entity controlling production, has been revised to incorporate the new wording ("entered as articles described in § 10.223(a)(6)") of paragraph (b)(1)(i) and to clarify what CBP believes is a necessary conclusion under the statutory text, that is, that in the described context the producer or entity must first meet the 85 (rather than the 75) percent standard.

g. In paragraph (b)(2)(ii), a new Example 2 and a new Example 3 have been added to cover new subparagraphs (C) and (D) of paragraph (b)(2)(i), and Examples 2 through 6 consequently have been redesignated as Examples 4 through 8.

h. Also in paragraph (b)(2)(ii), redesignated Example 6 has been revised in order to replace the former "produced and entered" in the same year scenario with a factual pattern addressing the 75 versus 85 percent standard and entry in different years.

i. Also in paragraph (b)(2)(ii), redesignated Example 7 has been revised in order to reflect that the 85 percent standard (rather than the 75 percent standard) applies to a new producer or entity controlling production, as stated in redesignated and revised subparagraph (G) of paragraph (b)(2)(i).

3. In paragraph (c)(3)(i), the text of the declaration of compliance has been modified by removing each reference to "components" and

by removing the words "produced and" before the word "entered" in blocks 4 and 6, in each case to reflect changes in statutory language.

4. Finally, in paragraph (d)(1)(v), the next to last sentence has been modified to state that the inventory records must indicate that the required production occurred (rather than "identify the date of" production), and the last sentence has been modified to refer to purchases made during the "accounting period" (rather than "year"), because the year of production is not relevant under the amended statute.

Other amendments

In addition to the changes described above that result from the changes made to the statute by section 3107(a) of the Act, CBP has included a number of other changes in the revised text of § 10.228 set forth in this document. These additional changes, which are intended to clarify or otherwise improve the interim regulatory texts, are as follows:

1. The definition of "cost" in paragraph (a)(4) and the definition of "declared customs value" in paragraph (a)(5) have been revised for purposes of clarity, in particular in order to include rules covering cases in which there is no price based on an exportation to a CBTPA beneficiary country.

2. The definition of "year" in paragraph (a)(6) has been reworded for purposes of clarity.

3. In Example 1 under paragraph (b)(2)(ii), the words "in the first year" have been added to the scenario in the first sentence to clarify that the year in question is one during which the 75 percent standard must be met.

4. In Example 5 under paragraph (b)(2)(ii), the references to foreign origin straps have been replaced by references to "strips and labels" to ensure that the example is clearly directed to findings and trimmings and not to materials that are considered to be components of brassieres.

5. In paragraph (c)(3)(i), the text of the declaration of compliance has been modified by replacing the words "all articles" with "brassieres" in blocks 4 through 6 and by simplifying the wording within block 6.

6. Finally, in paragraph (c)(3)(ii), the subparagraph (E) instruction for completion of block 6 has been removed in light of the simplification of the block 6 text, and former subparagraph (F) consequently has been redesignated as (E).

COMMENTS

Before adopting these interim regulations as a final rule, consideration will be given to any written comments timely submitted to CBP, including comments on the clarity of this interim rule and how it may be made easier to understand. Comments submitted will be

available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552) and § 103.11(b) of the Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Office of Regulations and Rulings, Bureau of Customs and Border Protection, 799 9th Street, N.W., Washington, D.C. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS AND THE REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of 5 U.S.C. 553(b)(B), CBP has determined that prior public notice and comment procedures on these regulations are unnecessary and contrary to the public interest. The regulatory changes provide trade benefits to the importing public, in some cases implement direct statutory mandates, and are necessary to carry out the preferential treatment and United States tariff changes proclaimed by the President under the Caribbean Basin Economic Recovery Act. For the same reasons, pursuant to the provisions of 5 U.S.C. 553(d)(1) and (3), CBP finds that there is good cause for dispensing with a delayed effective date. Because no notice of proposed rulemaking is required for interim regulations, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) do not apply.

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

PAPERWORK REDUCTION ACT

The collection of information contained in this interim rule has previously been reviewed and approved by the Office of Management and Budget (OMB) in accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) under OMB control number 1515–0226.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

SIGNING AUTHORITY

This regulation is being issued in accordance with 19 CFR 0.1(c)(1).

LIST OF SUBJECTS IN 19 CFR PART 10

Assembly, Bonds, Caribbean Basin Initiative, Customs duties and inspection, Exports, Imports, Preference programs, Reporting and recordkeeping requirements, Trade agreements.

AMENDMENTS TO THE REGULATIONS

For the reasons set forth in the preamble, Part 10 of the Customs Regulations (19 CFR Part 10) is amended as set forth below:

PART 10 — ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The authority citation for Part 10 continues to read in part as follows:

AUTHORITY: 19 U.S.C. 66, 1202 (General Note 23, Harmonized Tariff Schedule of the United States (HTSUS)), 1321, 1481, 1484, 1498, 1508, 1623, 1624, 3314;

* * * * *

Sections 10.221 through 10.228 and § § 10.231 through 10.237 also issued under 19 U.S.C. 2701 et seq.

2. Section 10.228 is revised to read as follows:

§ 10.228 Additional requirements for preferential treatment of brassieres.

(a) Definitions. When used in this section, the following terms have the meanings indicated:

(1) Producer. "Producer" means an individual, corporation, partnership, association, or other entity or group that exercises direct, daily operational control over the production process in a CBTPA beneficiary country.

(2) Entity controlling production. "Entity controlling production" means an individual, corporation, partnership, association, or other entity or group that is not a producer and that controls the production process in a CBTPA beneficiary country through a contractual relationship or other indirect means.

(3) Fabrics formed in the United States. "Fabrics formed in the United States" means fabrics that were produced by a weaving, knitting, needling, tufting, felting, entangling or other fabric-making process performed in the United States.

(4) Cost. "Cost" when used with reference to fabrics formed in the United States means:

(i) The price of the fabrics when last purchased, f.o.b. port of exportation, as set out in the invoice or other commercial documents, or, if the price is other than f.o.b. port of exportation:

(A) The price as set out in the invoice or other commercial documents adjusted to arrive at an f.o.b. port of exportation price; or

(B) If no exportation to a CBTPA beneficiary country is involved, the price as set out in the invoice or other commercial documents, less the freight, insurance, packing, and other costs incurred in transporting the fabrics to the place of production if included in that price; or

(ii) If the price cannot be determined under paragraph (a)(4)(i) of this section or if CBP finds that price to be unreasonable, all reasonable expenses incurred in the growth, production, manufacture, or other processing of the fabrics, including the cost or value of materials (which includes the cost of non-recoverable scrap generated in forming the fabrics) and general expenses, plus a reasonable amount for profit, and the freight, insurance, packing, and other costs, if any, incurred in transporting the fabrics to the port of exportation.

(5) Declared customs value. "Declared customs value" when used with reference to fabric contained in an article means the sum of:

(i) The cost of fabrics formed in the United States that the producer or entity controlling production can verify; and

(ii) The cost of all other fabric contained in the article, exclusive of all findings and trimmings, determined as follows:

(A) In the case of fabric purchased by the producer or entity controlling production, the f.o.b. port of exportation price of the fabric as set out in the invoice or other commercial documents, or, if the price is other than f.o.b. port of exportation:

(*1*) The price as set out in the invoice or other commercial documents adjusted to arrive at an f.o.b. port of exportation price, plus expenses for embroidering and dyeing, printing, and finishing operations applied to the fabric if not included in that price; or

(*2*) If no exportation to a CBTPA beneficiary country is involved, the price as set out in the invoice or other commercial documents, plus expenses for embroidering and dyeing, printing, and finishing operations applied to the fabric if not included in that price, but less the freight, insurance, packing, and other costs incurred in transporting the fabric to the place of production if included in that price;

(B) In the case of fabric for which the cost cannot be determined under paragraph (a)(5)(ii)(A) of this section or if CBP finds that cost to be unreasonable, all reasonable expenses incurred in the growth, production, or manufacture of the fabric, including the cost or value of materials (which includes the cost of non-recoverable scrap generated in the growth, production, or manufacture of the fabric), general expenses and embroidering and dyeing, printing, and finishing expenses, plus a reasonable amount for profit, and the

freight, insurance, packing, and other costs, if any, incurred in transporting the fabric to the port of exportation;

(C) In the case of fabric components purchased by the producer or entity controlling production, the f.o.b. port of exportation price of those fabric components as set out in the invoice or other commercial documents, less the cost or value of any non-textile materials, and less expenses for cutting or other processing to create the fabric components other than knitting to shape, that the producer or entity controlling production can verify, or, if the price is other than f.o.b. port of exportation:

(*1*) The price as set out in the invoice or other commercial documents adjusted to arrive at an f.o.b. port of exportation price, less the cost or value of any non-textile materials, and less expenses for cutting or other processing to create the fabric components other than knitting to shape, that the producer or entity controlling production can verify; or

(*2*) If no exportation to a CBTPA beneficiary country is involved, the price as set out in the invoice or other commercial documents, less the cost or value of any non-textile materials, and less expenses for cutting or other processing to create the fabric components other than knitting to shape, that the producer or entity controlling production can verify, and less the freight, insurance, packing, and other costs incurred in transporting the fabric components to the place of production if included in that price; and

(D) In the case of fabric components for which a fabric cost cannot be determined under paragraph (a)(5)(ii)(C) of this section or if CBP finds that cost to be unreasonable: all reasonable expenses incurred in the growth, production, or manufacture of the fabric components, including the cost or value of materials (which does not include the cost of recoverable scrap generated in the growth, production, or manufacture of the fabric components) and general expenses, but excluding the cost or value of any non-textile materials, and excluding expenses for cutting or other processing to create the fabric components other than knitting to shape, that the producer or entity controlling production can verify, plus a reasonable amount for profit, and the freight, insurance, packing, and other costs, if any, incurred in transporting the fabric components to the port of exportation.

(6) Year. "Year" means a 12-month period beginning on October 1 and ending on September 30 but does not include any 12-month period that began prior to October 1, 2000.

(7) Entered. "Entered" means entered, or withdrawn from warehouse for consumption, in the customs territory of the United States.

(b) Limitations on preferential treatment—(1) General. During the year that begins on October 1, 2002, and during any subsequent year, articles of a producer or an entity controlling production that

conform to the production standards set forth in § 10.223(a)(6) will be eligible for preferential treatment only if:

(i) The aggregate cost of fabrics (exclusive of all findings and trimmings) formed in the United States that were used in the production of all of those articles of that producer or that entity controlling production that are entered as articles described in § 10.223(a)(6) during the immediately preceding year was at least 75 percent of the aggregate declared customs value of the fabric (exclusive of all findings and trimmings) contained in all of those articles of that producer or that entity controlling production that are entered as articles described in § 10.223(a)(6) during that year; or

(ii) In a case in which the 75 percent requirement set forth in paragraph (b)(1)(i) of this section was not met during a year and therefore those articles of that producer or that entity controlling production were not eligible for preferential treatment during the following year, the aggregate cost of fabrics (exclusive of all findings and trimmings) formed in the United States that were used in the production of all of those articles of that producer or that entity controlling production that conform to the production standards set forth in § 10.223(a)(6) and that were entered during the immediately preceding year was at least 85 percent of the aggregate declared customs value of the fabric (exclusive of all findings and trimmings) contained in all of those articles of that producer or that entity controlling production that conform to the production standards set forth in § 10.223(a)(6) and that were entered during that year; and

(iii) In conjunction with the filing of the claim for preferential treatment under § 10.225, the importer records on the entry summary or warehouse withdrawal for consumption (Customs Form 7501, column 34), or its electronic equivalent, the distinct and unique identifier assigned by CBP to the applicable documentation prescribed under paragraph (c) of this section.

(2) Rules of application—(i) General. For purposes of paragraphs (b)(1)(i) and (b)(1)(ii) of this section and for purposes of preparing and filing the documentation prescribed in paragraph (c) of this section, the following rules will apply:

(A) The articles in question must have been produced in the manner specified in § 10.223(a)(6) and the articles in question must be entered within the same year;

(B) Articles that are exported to countries other than the United States and are never entered are not to be considered in determining compliance with the 75 or 85 percent standard specified in paragraph (b)(1)(i) or paragraph (b)(1)(ii) of this section;

(C) Articles that are entered under an HTSUS subheading other than the HTSUS subheading which pertains to articles described in § 10.223(a)(6) are not to be considered in determining

compliance with the 75 percent standard specified in paragraph (b)(1)(i) of this section;

(D) For purposes of determining compliance with the 85 percent standard specified in paragraph (b)(1)(ii) of this section, all articles that conform to the production standards set forth in § 10.223(a)(6) must be considered, regardless of the HTSUS subheading under which they were entered;

(E) Fabric components and fabrics that constitute findings or trimmings are not to be considered in determining compliance with the 75 or 85 percent standard specified in paragraph (b)(1)(i) or paragraph (b)(1)(ii) of this section;

(F) Beginning October 1, 2002, in order for articles to be eligible for preferential treatment in a given year, a producer of, or entity controlling production of, those articles must have met the 75 percent standard specified in paragraph (b)(1)(i) of this section during the immediately preceding year. If articles of a producer or entity controlling production fail to meet the 75 percent standard specified in paragraph (b)(1)(i) of this section during a year, articles of that producer or entity controlling production:

(*1*) Will not be eligible for preferential treatment during the following year;

(*2*) Will remain ineligible for preferential treatment until the year that follows a year in which articles of that producer or entity controlling production met the 85 percent standard specified in paragraph (b)(1)(ii) of this section; and

(*3*) After the 85 percent standard specified in paragraph (b)(1)(ii) of this section has been met, will again be subject to the 75 percent standard specified in paragraph (b)(1)(i) of this section during the following year for purposes of determining eligibility for preferential treatment in the next year.

(G) A new producer or new entity controlling production, that is, a producer or entity controlling production which did not produce or control production of articles that were entered as articles described in § 10.223(a)(6) during the immediately preceding year, must first establish compliance with the 85 percent standard specified in paragraph (b)(1)(ii) of this section as a prerequisite to preparation of the declaration of compliance referred to in paragraph (c) of this section;

(H) A declaration of compliance prepared by a producer or by an entity controlling production must cover all production of that producer or all production that the entity controls for the year in question;

(I) A producer is not required to prepare a declaration of compliance if all of its production is covered by a declaration of compliance prepared by an entity controlling production;

(J) In the case of a producer, the 75 or 85 percent standard specified in paragraph (b)(1)(i) or paragraph (b)(1)(ii) of this section

and the declaration of compliance procedure under paragraph (c) of this section apply to all articles of that producer for the year in question, even if some but not all of that production is also covered by a declaration of compliance prepared by an entity controlling production;

(K) The U.S. importer does not have to be the producer or the entity controlling production who prepared the declaration of compliance; and

(L) The exclusion references regarding findings and trimmings in paragraph (b)(1)(i) and paragraph (b)(1)(ii) of this section apply to all findings and trimmings, whether or not they are of foreign origin.

(ii) Examples. The following examples will illustrate application of the principles set forth in paragraph (b)(2)(i) of this section.

Example 1. A CBTPA beneficiary country producer of articles that meet the production standards specified in § 10.223(a)(6) in the first year sends 50 percent of that production to CBTPA region markets and the other 50 percent to the U.S. market; the cost of the fabrics formed in the United States equals 100 percent of the value of all of the fabric in the articles sent to the CBTPA region and 60 percent of the value of all of the fabric in the articles sent to the United States. Although the cost of fabrics formed in the United States is more than 75 percent of the value of all of the fabric used in all of the articles produced, this producer could not prepare a valid declaration of compliance because the articles sent to the United States did not meet the minimum 75 percent standard.

Example 2. A producer sends to the United States in the first year three shipments of articles that meet the description in § 10.223(a)(6); one of those shipments is entered under the HTSUS subheading that covers articles described in § 10.223(a)(6), the second shipment is entered under the HTSUS subheading that covers articles described in § 10.223(a)(12), and the third shipment is entered under subheading 9802.00.80, HTSUS. In determining whether the minimum 75 percent standard has been met in the first year for purposes of entry of articles under the HTSUS subheading that covers articles described in § 10.223(a)(6) during the following (that is, second) year, consideration must be restricted to the articles in the first shipment and therefore must not include the articles in the second and third shipments.

Example 3. A producer in the second year begins production of articles that conform to the production standards specified in § 10.223(a)(6); some of those articles are entered in that year under HTSUS subheading 6212.10 and others under HTSUS subheading 9802.00.80 but none are entered in that year under the HTSUS subheading which pertains to articles described in § 10.223(a)(6) because the 75 percent standard had not been met in the preceding (that is, first) year. In this case the 85 percent standard applies, and

all of the articles that were entered under the various HTSUS provisions in the second year must be taken into account in determining whether that 85 percent standard has been met. If the 85 percent was met in the aggregate for all of the articles entered in the second year, in the next (that is, third) year articles of that producer may receive preferential treatment under the HTSUS subheading which pertains to articles described in § 10.223(a)(6).

Example 4. An entity controlling production of articles that meet the description in § 10.223(a)(6) buys for the U.S., Canadian and Mexican markets; the articles in each case are first sent to the United States where they are entered for consumption and then placed in a commercial warehouse from which they are shipped to various stores in the United States, Canada and Mexico. Notwithstanding the fact that some of the articles ultimately ended up in Canada or Mexico, a declaration of compliance prepared by the entity controlling production must cover all of the articles rather than only those that remained in the United States because all of those articles had been entered for consumption.

Example 5. Fabric is cut and sewn in the United States with other U.S. materials to form cups which are joined together to form brassiere front subassemblies in the United States, and those front subassemblies are then placed in a warehouse in the United States where they are held until the following year; during that following year all of the front subassemblies are shipped to a CBTPA beneficiary country where they are assembled with elastic strips and labels produced in an Asian country and other fabrics, components or materials produced in the CBTPA beneficiary country to form articles that meet the production standards specified in § 10.223(a)(6) and that are then shipped to the United States and entered during that same year. In determining whether the entered articles meet the minimum 75 or 85 percent standard, the fabric in the elastic strips and labels is to be disregarded entirely because the strips and labels constitute findings or trimmings for purposes of this section, and all of the fabric in the front subassemblies is countable because it was all formed in the United States and used in the production of articles that were entered in the same year.

Example 6. A CBTPA beneficiary country producer's entire production of articles that meet the description in § 10.223(a)(6) is sent to a U.S. importer in two separate shipments, one in February and the other in June of the same calendar year; the articles shipped in February do not meet the minimum 75 percent standard, the articles shipped in June exceed the 85 percent standard, and the articles in the two shipments, taken together, do meet the 75 percent standard; the articles covered by the February shipment are entered for consumption on March 1 of that calendar year, and the articles covered by the June shipment are placed in a CBP bonded warehouse upon arrival and are subsequently withdrawn from warehouse for con-

sumption on November 1 of that calendar year. The CBTPA beneficiary country producer may not prepare a valid declaration of compliance covering the articles in the first shipment because those articles did not meet the minimum 75 percent standard and because those articles cannot be included with the articles of the second shipment on the same declaration of compliance since they were entered in a different year. However, the CBTPA beneficiary country producer may prepare a valid declaration of compliance covering the articles in the second shipment because those articles did meet the requisite 85 percent standard which would apply for purposes of entry of articles in the following year.

Example 7. A producer in the second year begins production of articles exclusively for the U.S. market that meet the production standards specified in § 10.223(a)(6), but the entered articles do not meet the requisite 85 percent standard until the third year; the entered articles fail to meet the 75 percent standard in the fourth year; and the entered articles do not attain the 85 percent standard until the sixth year. The producer's articles may not receive preferential treatment during the second year because there was no production (and thus there were no entered articles) in the immediately preceding (that is, first) year on which to assess compliance with the 75 percent standard. The producer's articles also may not receive preferential treatment during the third year because the 85 percent standard was not met in the immediately preceding (that is, second) year. However, the producer's articles are eligible for preferential treatment during the fourth year based on compliance with the 85 percent standard in the immediately preceding (that is, third) year. The producer's articles may not receive preferential treatment during the fifth year because the 75 percent standard was not met in the immediately preceding (that is, fourth) year. The producer's articles may not receive preferential treatment during the sixth year because the 85 percent standard has become applicable and was not met in the immediately preceding (that is, fifth) year. The producer's articles are eligible for preferential treatment during the seventh year because the 85 percent standard was met in the immediately preceding (that is, sixth) year, and during that seventh year the 75 percent standard is applicable for purposes of determining whether the producer's articles are eligible for preferential treatment in the following (that is, eighth) year.

Example 8. An entity controlling production (Entity A) uses five CBTPA beneficiary country producers (Producers 1–5), all of which produce only articles that meet the description in § 10.223(a)(6); Producers 1–4 send all of their production to the United States and Producer 5 sends 10 percent of its production to the United States and the rest to Europe; Producers 1–3 and Producer 5 produce only pursuant to contracts with Entity A, but Producer 4 also operates independently of Entity A by producing for several U.S. importers, one

of which is an entity controlling production (Entity B) that also controls all of the production of articles of one other producer (Producer 6) which sends all of its production to the United States. A declaration of compliance prepared by Entity A must cover all of the articles of Producers 1–3 and the 10 percent of articles of Producer 5 that are sent to the United States and that portion of the articles of Producer 4 that are produced pursuant to the contract with Entity A, because Entity A controls the production of those articles. There is no need for Producers 1–3 and Producer 5 to prepare a declaration of compliance because they have no production that is not covered by a declaration of compliance prepared by an entity controlling production. A declaration of compliance prepared by Producer 4 would cover all of its production, that is, articles produced for Entity A, articles produced for Entity B, and articles produced independently for other U.S. importers; a declaration of compliance prepared by Entity B must cover that portion of the production of Producer 4 that it controls as well as all of the production of Producer 6 because Entity B also controls all of the production of Producer 6. Producer 6 would not prepare a declaration of compliance because all of its production is covered by the declaration of compliance prepared by Entity B.

(c) Documentation—(1) Initial declaration of compliance. In order for an importer to comply with the requirement set forth in paragraph (b)(1)(iii) of this section, the producer or the entity controlling production must have filed with CBP, in accordance with paragraph (c)(4) of this section, a declaration of compliance with the applicable 75 or 85 percent requirement prescribed in paragraph (b)(1)(i) or (b)(1)(ii) of this section. After filing of the declaration of compliance has been completed, CBP will advise the producer or the entity controlling production of the distinct and unique identifier assigned to that declaration. The producer or the entity controlling production will then be responsible for advising each appropriate U.S. importer of that distinct and unique identifier for purposes of recording that identifier on the entry summary or warehouse withdrawal. In order to provide sufficient time for advising the U.S. importer of that distinct and unique identifier prior to the arrival of the articles in the United States, the producer or the entity controlling production should file the declaration of compliance with CBP at least 10 calendar days prior to the date of the first shipment of the articles to the United States.

(2) Amended declaration of compliance. If the information on the declaration of compliance referred to in paragraph (c)(1) of this section is based on an estimate because final year-end information was not available at that time and the final data differs from the estimate, or if the producer or the entity controlling production has reason to believe for any other reason that the declaration of compliance that was filed contained erroneous information, within 30 cal-

endar days after the final year-end information becomes available or within 30 calendar days after the date of discovery of the error:

(i) The producer or the entity controlling production must file with the CBP office identified in paragraph (c)(4) of this section an amended declaration of compliance containing that final year-end information or other corrected information; or

(ii) If that final year-end information or other corrected information demonstrates noncompliance with the applicable 75 or 85 percent requirement, the producer or the entity controlling production must in writing advise both the CBP office identified in paragraph (c)(4) of this section and each appropriate U.S. importer of that fact.

(3) Form and preparation of declaration of compliance—(i) Form. The declaration of compliance referred to in paragraph (c)(1) of this section may be printed and reproduced locally and must be in the following format:

<table>
<tr><td colspan="2">Caribbean Basin Trade Partnership Act
Declaration of Compliance for Brassieres
(19 CFR 10.223(a)(6) and 10.228)</td></tr>
<tr><td>1. Year beginning date: October 1, _____ .
Year ending date: September 30, _____ .</td><td>Official U.S. Customs and Border Protection Use Only
Assigned number: _____
Assignment date: _____</td></tr>
<tr><td colspan="2">2. Identity of preparer (producer or entity controlling production):

Full name and address:

Telephone number: _____
Facsimile number: _____
Importer identification number: _____</td></tr>
<tr><td colspan="2">3. If the preparer is an entity controlling production, provide the following for each producer:

Full name and address:

Telephone number: _____
Facsimile number: _____</td></tr>
<tr><td colspan="2">4. Aggregate cost of fabrics formed in the United States that were used in the production of brassieres that were entered during the year: _____</td></tr>
<tr><td colspan="2">5. Aggregate declared customs value of the fabric contained in brassieres that were entered during the year: _____</td></tr>
<tr><td colspan="2">6. I declare that the aggregate cost of fabric formed in the United States was at least 75 percent (or 85 percent, if applicable under 19 CFR 10.228(b)(1)(ii)) of the aggregate declared customs value of the fabric contained in brassieres entered during the year.</td></tr>
<tr><td>7. Authorized signature:

Date:</td><td>8. Name and title (print or type):</td></tr>
</table>

(ii) Preparation. The following rules will apply for purposes of completing the declaration of compliance set forth in paragraph (c)(3)(i) of this section:

(A) In block 1, fill in the year commencing October 1 and ending September 30 of the calendar year during which the applicable 75 or 85 percent standard specified in paragraph (b)(1)(i) or paragraph (b)(1)(ii) of this section was met;

(B) Block 2 should state the legal name and address (including country) of the preparer and should also include the preparer's importer identification number (see § 24.5 of this chapter), if the preparer has one;

(C) Block 3 should state the legal name and address (including country) of the CBTPA beneficiary country producer if that producer is not already identified in block 2. If there is more than one producer, attach a list stating the legal name and address (including country) of all additional producers;

(D) Blocks 4 and 5 apply only to articles that were entered during the year identified in block 1; and

(E) In block 7, the signature must be that of an authorized officer, employee, agent or other person having knowledge of the relevant facts and the date must be the date on which the declaration of compliance was completed and signed.

(4 Filing of declaration of compliance. The declaration of compliance referred to in paragraph (c)(1) of this section:

(i) Must be completed either in the English language or in the language of the country in which the articles covered by the declaration were produced. If the declaration is completed in a language other than English, the producer or the entity controlling production must provide to CBP upon request a written English translation of the declaration; and

(ii) Must be filed with the New York Strategic Trade Center, Bureau of Customs and Border Protection, 1 Penn Plaza, New York, New York 10119.

(d) Verification of declaration of compliance—(1) Verification procedure. A declaration of compliance filed under this section will be subject to whatever verification CBP deems necessary. In the event that CBP for any reason is prevented from verifying the statements made on a declaration of compliance, CBP may deny any claim for preferential treatment made under § 10.225 that is based on that declaration. A verification of a declaration of compliance may involve, but need not be limited to, a review of:

(i) All records required to be made, kept, and made available to CBP by the importer, the producer, the entity controlling production, or any other person under part 163 of this chapter;

(ii) Documentation and other information regarding all articles that meet the production standards specified in § 10.223(a)(6) that were exported to the United States and that were entered dur-

ing the year in question, whether or not a claim for preferential treatment was made under § 10.225. Those records and other information include, but are not limited to, work orders and other production records, purchase orders, invoices, bills of lading and other shipping documents;

(iii) Evidence to document the cost of fabrics formed in the United States that were used in the production of the articles in question, such as purchase orders, invoices, bills of lading and other shipping documents, and customs import and clearance documents, work orders and other production records, and inventory control records;

(iv) Evidence to document the cost or value of all fabric other than fabrics formed in the United States that were used in the production of the articles in question, such as purchase orders, invoices, bills of lading and other shipping documents, and customs import and clearance documents, work orders and other production records, and inventory control records; and

(v) Accounting books and documents to verify the records and information referred to in paragraphs (d)(1)(ii) through (d)(1)(iv) of this section. The verification of purchase orders, invoices and bills of lading will be accomplished through the review of a distinct audit trail. The audit trail documents must consist of a cash disbursement or purchase journal or equivalent records to establish the purchase of the fabric. The headings in each of these journals or other records must contain the date, vendor name, and amount paid for the fabric. The verification of production records and work orders will be accomplished through analysis of the inventory records of the producer or entity controlling production. The inventory records must reflect the production of the finished article which must be referenced to the original purchase order or lot number covering the fabric used in production. In the inventory production records, the inventory should show the opening balance of the inventory plus the purchases made during the accounting period and the inventory closing balance.

(2) Notice of determination. If, based on a verification of a declaration of compliance filed under this section, CBP determines that the applicable 75 or 85 percent standard specified in paragraph (b)(1)(i) or paragraph (b)(1)(ii) of this section was not met, CBP will publish a notice of that determination in the FEDERAL REGISTER.

ROBERT C. BONNER,
Commissioner of Customs and Border Protection.

Approved: September 25, 2003

Deputy Assistant Secretary of the Treasury
Timothy E. Skud

[Published in the Federal Register, (September 30, 2003 (68 FR 56166)]

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, October 1, 2003,

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

MICHAEL T. SCHMITZ,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED REVOCATION AND MODIFICATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF HAND TOOLS

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of five ruling letters and modification of one ruling letter and revocation of treatment relating to the tariff classification of hand tools.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke five ruling letters and modify one ruling letter pertaining to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of various hand tools and to revoke any treatment previously accorded by Customs to substantially identical transactions. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before November 15, 2003.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799 9th Street, NW, Washington, D.C during regular business hours. Ar-

rangements to inspect submitted comments should be made in advance by calling Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Keith Rudich, Commercial Rulings Division, (202) 572–8782.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. § 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke five ruling letters and modify one ruling letter pertaining to the tariff classification of various hand tools. Although in this notice Customs is specifically referring to six rulings, NY I84751, NY I87124, NY I87336, NY I87835, NY I89087, and NY I89237, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the six identified. No further rulings have been found. This notice will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs

intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In NY I84751, dated August 6, 2002, set forth as "Attachment A" to this document, Customs found that a rotary cutting tool with a circular steel blade and a plastic molded handle was classified in subheading 8205.51.75, HTSUS, as handtools, household tools, other. Customs has reviewed the matter and determined that the correct classification of the rotary cutting tool is in subheading 8205.51.30, HTSUS, as handtools, household tools, of iron or steel, other.

In NY I87124, dated October 10, 2002, set forth as "Attachment B" to this document, Customs found that a rolling scissors tool with circular metal blades and a plastic handle was classified in subheading 8205.51.75, HTSUS, as handtools, household tools, other. Customs has reviewed the matter and determined that the correct classification of the rolling scissors is in subheading 8205.51.30, HTSUS, as handtools, household tools, of iron or steel, other.

In NY I87336, dated October 22, 2002, set forth as "Attachment C" to this document, Customs found that a three prong hook grasping computer accessory/tool made of a plastic pencil-like body with a plunger on one end which, when pressed, pushes out three stainless steel wires from the opposite end which can be used for grabbing items, was classified in subheading 8205.59.80, HTSUS, handtools, other, other, other. Customs has reviewed the matter and determined that the correct classification of the computer accessory/tool is in subheading 8205.59.55, HTSUS, as handtools, other, other, of iron or steel, other.

In NY I87835, dated October 25, 2002, set forth as "Attachment D" to this document, Customs found that a "Scrappin Tracer" tool, with a pencil-like kiln dried wooden handle and a stainless steel needle protruding from one end, was classified in subheading 8205.59.80, HTSUS, handtools, other, other, other. Customs has reviewed the matter and determined that the correct classification of the "Scrappin Tracer" is in subheading 8205.59.55, HTSUS, as handtools, other, other, of iron or steel, other.

In NY I89237, dated December 13, 2002, set forth as "Attachment E" to this document, Customs found that a hoof pick was classified in subheading 8205.59.80, HTSUS, as handtools, other, other, other. Customs has reviewed the matter and determined that the correct classification of the hoof pick is in subheading 8205.59.55, HTSUS, as handtools, other, of iron or steel, other.

In NY I89087, dated December 17, 2002, set forth as "Attachment F" to this document, Customs found that standard paper crimpers, made from an aluminum wheel and rod connected to a plastic handle to give paper a "corrugated" pattern, was classified in subheading 8205.51.75, HTSUS, as handtools, household tools, other. Customs has reviewed the matter and determined that the correct classification of the standard paper crimpers is in subheading 8205.51.60, HTSUS, as handtools, household tools, of aluminum.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke NY I84751, NY I87124, NY I87336, NY I87835, and NY I89237, and modify NY I89087, and revoke any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letters (HQ) 966269, 966655, 966656, 966657, 966659, and 966658, respectively (see Attachments G, H, I, J, K, and L, respectively, to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: September 23, 2003

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY I84751
August 6, 2002
CLA–2–82:RR:NC:N1:118 I84751
CATEGORY: Classification
TARIFF NO.: 8205.51.7500

MS. JENNIFER R. LAM
COMPLIANCE SUPERVISOR
FISKARS CONSUMER PRODUCTS, INC.
305 84th Avenue South
P.O. Box 8027
Wausau, WI 54401

RE: The tariff classification of Rotary Cutters assembled in Mexico.

DEAR MS. LAM:

In your letter dated July 24, 2002, you requested a ruling on tariff classification.

You have described your product as a rotary cutter. It is a cutting hand tool with a circular steel blade and plastic molded handle with guard. It is used for crafting, quilting and paper cutting projects. Your sample will be returned to you as you have requested.

The applicable subheading for this product will be 8205.51.7500, Harmonized Tariff Schedule of the United States (HTS), which provides for handtools (including glass cutters) not elsewhere specified or included; blow torches and similar self-contained torches; vises, clamps and the like, other than accessories for and parts of machine tools; anvils; portable forges; hand- or pedal-operated grinding wheels with frameworks; base metal parts thereof: other handtools (including glass cutters) and parts thereof: household tools, and parts thereof: other. The general rate of duty will be 3.7% ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R.177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kathy Campanelli at 646–733–3021.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

NY I87124

October 10, 2002
CLA–2–82:RR:NC:1:118 I87124
CATEGORY: Classification
TARIFF NO.: 8205.51.7500

MS. GAIL HAGANS
D.L. BYNUM & COMPANY INC.
510 Plaza Drive, Suite 1890
Atlanta, Georgia 30349

RE: The tariff classification of rolling scissors from China.

DEAR MS. HAGANS:

In your letter dated September 27, 2002, on behalf of your client IBS, LLC, located in Fayetteville, GA, you requested a tariff classification ruling.

You have described your sample as the Cutting Edge(Rolling Scissors. The tool acts as a utility type knife. It is intended to work with gift-wrap, wallpaper, shelf paper, freezer paper, blue prints, vinyl, plastic film and many arts and crafts type functions. It has no pointed blades or sharp edges. It functions by rolling the cutting edge wheels along the cut line or pulling the material towards you, through the cutting edge. The tool is made predominately of plastic with a steel working edge.

The applicable subheading for the Cutting Edge(Rolling Scissors will be 8205.51.7500, Harmonized Tariff Schedule of the United States (HTS), which provides for handtools (including glass cutters) not elsewhere specified or included; blow torches and similar self-contained torches; vises, clamps and the like, other than accessories for and parts of machine tools; anvils; portable forges; hand- or pedal-operated grinding wheels with frameworks; base metal parts thereof: other handtools (including glass cutters) and parts thereof: household tools, and parts thereof: other. The rate of duty will be 3.7% ad valorem.

Consideration was given to classifying your product in subheading 8203.30.0000, HTS, as you have suggested. However, that classification was deemed inappropriate as that subheading is for metal cutting shears and similar tools, including tinmen's snips, and other sheet metal or wire cutting shears. Your product is of a different kind.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kathy Campanelli at 646–733–3021.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

NY I87336
October 22, 2002
CLA–2–82:RR:NC:1:118 I87336
CATEGORY: Classification
TARIFF NO.: 8205.59.8000

MR. MARK WEISBROD
PRESIDENT
THE BETTER MOUSE TRAP PEOPLE (B.C.) LTD.
111 Water Street - Unit 210
Vancouver, B.C.
Canada V6B 1A7

RE: The tariff classification of a tool from Taiwan or the People's Republic of China.

DEAR MR. WEISBROD:

In your letter dated October 10, 2002, you requested a tariff classification ruling.

You have described your item as a plastic "3 prong hook" which is a computer accessory/tool. It is about 4½" in length with a plastic piston type device mounted in the top end. Attached to the movable piston are three fine metallic wires (of little cost) that protrude from the bottom end of the casing when the piston is depressed. The casing and the piston are made of plastic. The tool is used to locate or pick up very small nuts, bolts or computer parts. The item will be packaged in a blister card for sale.

The applicable subheading for the "3 prong hook" will be 8205.59.8000, Harmonized Tariff Schedule of the United States (HTS), which provides for handtools (including glass cutters) not elsewhere specified or included; blow torches and similar self-contained torches; vises, clamps and the like, other than accessories for and parts of machine tools; anvils; portable forges; hand- or pedal-operated grinding wheels with frameworks; base metal parts thereof: other handtools (including glass cutters) and parts thereof: other: other: other: other. The rate of duty will be 3.7% ad valorem.

There are no quota/visa implications for this product at this time.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kathy Campanelli at 646–733–3021.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT D]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY I87835
October 25, 2002
CLA–2–82:RR:NC:1:118 I87835
CATEGORY: Classification
TARIFF NO.: 8205.59.8000

MR. MARK WEISBROD PRESIDENT
THE BETTER MOUSE TRAP PEOPLE (B.C.) LTD.
111 Water Street - Unit 210
Vancouver, B.C.
Canada V6B 1A7

RE: The tariff classification of a tool from the People's Republic of China.

DEAR MR. WEISBROD:

In your letter dated October 18 2002, you requested a tariff classification ruling.

You have described your item as the "Scrappin' Tracer" which is a wooden handled etching tool. It is about 5¼" in length with a kiln dried wooden handle and stainless steel "needle". The needle is mounted in the wooden handle and protrudes about ½". You state that the end of the needle is sharpened to facilitate etching or cutting of paper and that the tool actually scrapes rather than cuts paper. The item will be packaged in a blister card for sale.

The applicable subheading for the "Scrappin' Tracer" will be 8205.59.8000, Harmonized Tariff Schedule of the United States (HTS), which provides for handtools (including glass cutters) not elsewhere specified or included; blow torches and similar self-contained torches; vises, clamps and the like, other than accessories for and parts of machine tools; anvils; portable forges; hand- or pedal-operated grinding wheels with frameworks; base metal parts thereof: other handtools (including glass cutters) and parts thereof: other: other: other: other. The rate of duty will be 3.7% ad valorem.

There are no quota/visa implications for this product at this time.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kathy Campanelli at 646–733–3021.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT E]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

NY I89237
December 13, 2002
CLA–2–82:RR:NC:1:118 I89237
CATEGORY: Classification
TARIFF NO.: 8205.59.8000

MS. LISA HOLLAND HELLMANN
WORLDWIDE LOGISTICS
7280 Alum Creek Drive Suites A-D
Columbus, OH 43217

RE: The tariff classification of a hoof pick from Taiwan.

DEAR MS. HOLLAND:

In your letter dated December 9, 2002, on behalf of your client, New Product Innovations, you requested a tariff classification ruling.

You have described your item as a hoof pick. It is used to remove debris from horse hooves. You state that it is made of a plastic handle (63% by weight) and a stainless steel pick (37% by weight). You further state that the chief value of the product is the plastic handle. The total length of the implement is 6.65″ and it is 1.5″ in width.

The applicable subheading for the hoof pick will be 8205.59.8000, Harmonized Tariff Schedule of the United States (HTS), which provides for handtools (including glass cutters) not elsewhere specified or included; blow torches and similar self-contained torches; vises, clamps and the like, other than accessories for and parts of machine tools; anvils; portable forges; hand- or pedal-operated grinding wheels with frameworks; base metal parts thereof: other handtools (including glass cutters) and parts thereof: other: other: other: other. The rate of duty will be 3.7% ad valorem.

Consideration was given to classifying your product in subheading 7326.90.8586, HTS, as you have suggested. However, that classification was deemed inappropriate as the hoof pick is enumerated in the Explanatory Notes in heading 8205.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kathy Campanelli at 646–733–3021.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT F]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

NY I89087
December 17, 2002
CLA–2–82:RR:NC:1:118 I89087
CATEGORY: Classification
TARIFF NO.: 8205.51.7500; 3926.90.9880

MS. JENNIFER R. LAM
FISKARS CONSUMER PRODUCTS, INC.
8300 Highland Drive
Wausau, WI 54401

RE: The tariff classification of crimpers from Korea.

DEAR MS. LAM:

In your letter dated December 6, 2002, you requested a tariff classification ruling. The sample that you have submitted with your request will be returned to you as requested.

You have described your products as follows:

Paper crimper model 9340 7097 - is a handtool used to create a corrugated pattern on paper up to 6½" wide. You have advised us that it is used for household paper crafting projects such as customizing cards. You have stated that the crimping wheel and the rod that holds it are made of aluminum and that the remainder of the tool is plastic. You indicated that the plastic imparts the chief weight and value of this item.

Wavy crimper model 9341 7097 (sample submitted) - is a handtool made of plastic, with aluminum rods. You stated that the chief value and weight of the item is imparted by the plastic. The tool is used to create a unique wavy pattern on paper. The wave is created with the plastic coming in contact with the paper. Like the paper crimper above, it is great for customizing cards and paper crafting projects.

The applicable subheading for the paper crimper (model 9340 7097) will be 8205.51.7500, Harmonized Tariff Schedule of the United States (HTS), which provides for handtools (including glass cutters) not elsewhere specified or included; blow torches and similar self-contained torches; vises, clamps and the like, other than accessories for and parts of machine tools; anvils; portable forges; hand- or pedal-operated grinding wheels with frameworks; base metal parts thereof: other handtools (including glass cutters) and parts thereof: household tools, and parts thereof: other. The rate of duty will be 3.7% ad valorem.

The applicable subheading for the wavy crimper (model 9341 7097) will be 3926.90.9880, HTS, which provides for other articles of plastics and articles of other materials of headings 3901 to 3914: other: other: other. The rate of duty will be 5.3% ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is im-

ported. If you have any questions regarding the ruling, contact National Import Specialist Kathy Campanelli at 646–733–3021.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT G]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966269
CLA–2 RR:CR:GC 966269 KBR
CATEGORY: Classification
TARIFF NOS.: 8205.51.30

MS. JENNIFER R. LAM
COMPLIANCE SUPERVISOR
FISKARS CONSUMER PRODUCTS, INC.
305 84th Avenue South
P.O. Box 8027
Wausau, WI, 54401

RE: Revocation of NY I84751; Rotary Cutter

DEAR MS. LAM:

This is in reference to New York Ruling Letter (NY) I84751, dated August 6, 2002, issued by the Customs National Commodity Specialist Division, regarding the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of a Fiskars Brand rotary cutter tool. We have reconsidered NY I84751 and determined that the classification of the rotary cutting tool is not correct.

In NY I84751, Customs found that the rotary cutting tool was classified in subheading 8205.51.75, HTSUS, as other handtools, household tools, other. Customs has reviewed the matter and believes that the correct classification of the rotary cutting tool is in subheading 8205.51.30, HTSUS, as other handtools, household tools, or iron or steel, other.

FACTS:

The product involved is a rotary cutting tool. The article is comprised of a circular steel blade with a plastic molded handle with a guard. It is intended to be used for crafting, quilting, and paper cutting projects. The plastic handle is molded with a loop through which to place one's hand. Some models of rotary cutting tool have an interchangeable steel blade. Different blades may be used to achieve a different effect, such as: a pinking blade, a wave blade, a deckle blade, a perforating blade, a scoring blade, a scallop blade, a squiggle blade, a Victorian blade, and a tiara blade. The handle has a push button engagement lever to extend the blade away from the handle for use. There is a release button on the handle to retract the blade for storage and safety.

ISSUE:

Whether the rotary cutting tool is a handtool of the household type of iron or steel?

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that most goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

Inspection of the rotary cutting tool reveals that it is a composite good made up of a plastic molded handle and a steel blade. Each of the components is described by different subheadings within heading 8205, HTSUS. Thus, GRI 6 applies.

The HTSUS subheadings under consideration are as follows:

8205	Handtools (including glass cutters) not elsewhere specified or included; blow torches and similar self-contained torches; vises, clamps and the like, other than accessories for and parts of machine tools; anvils; portable forges; hand- or pedal-operated grinding wheels with frameworks; base metal parts thereof:
	Other handtools (including glass cutters) and parts thereof:
8502.51	Household tools, and parts thereof:
	Of iron or steel:
8205.51.30	Other (including parts)
8205.51.75	Other

Because the item is a composite good, we turn to GRI 3(b), applied at the subheading level by GRI 6, which states that when goods are *prima facie* classifiable under two or more (sub)headings, classification shall be effected as follows:

> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a) [by reference to the heading which provides the most specific description], shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

Under EN (VII) for Rule 3(b), goods are to be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

Under EN (VIII) for Rule 3(b), the factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods. Recent court decisions on the essential character for GRI 3(b)

purposes have looked primarily to the role of the constituent material in relation to the use of the goods. *See, e.g., Better Home Plastics Corp. v. U.S.*, 916 F. Supp. 1265 (CIT 1996), *aff'd* 119 F.3d 969 (Fed. Cir. 1997) (holding the utilitarian role of a shower liner is more important than decorative value of the curtain sold with it); *Mita Copystar America, Inc. v. U.S.*, 966 F. Supp. 1245 (CIT 1997), *reh'g denied*, 994 F. Supp. 393 (1998).

Customs has previously determined that a similar article, a wheeled pizza cutter made with both metal and plastic components is classified in subheading 8205.51.30, HTSUS. *See* NY A89210 (November 8, 1996), HQ 951605 (June 1, 1992), and HQ 951881 (June 26, 1992). Another Customs ruling, HQ 950609 (January 7, 1992), involved a bottle opener with a plastic handle and a metal ring. Although the bottle opener had a plastic handle, it was described as having a metal working edge and, therefore, was classified as of iron or steel in subheading 8205.51.30, HTSUS.

We believe that the essential character of the rotary cutting tool is imparted by the steel blade. Without the steel blade, the article would not be able to accomplish its primary role or function as a cutting device. Therefore, since the essential character of the rotary cutting tool is determined by the steel component, the classification of the article is in subheading 8205.51.30, HTSUS, as other handtools, household tools, of iron or steel, other.

HOLDING:

The rotary cutting tool is classified in subheading 8205.51.30, HTSUS, as other handtools, household tools, of iron or steel, other.

EFFECT ON OTHER RULINGS:

NY I84751 dated August 6, 2002, is **REVOKED.**

MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT H]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966655
CLA-2 RR:CR:GC 966655 KBR
CATEGORY: Classification
TARIFF NOS.: 8205.51.30

MS. GAIL HAGANS
D.L. BYNUM & COMPANY, INC.
510 Plaza Drive, Suite 1890
Atlanta, GA 30349

RE: Revocation of NY I87124; Rolling Scissors

DEAR MS. HAGANS:

This is in reference to New York Ruling Letter (NY) I87124, dated October 10, 2002, issued by the Customs National Commodity Specialist Division, issued to you on behalf of your client, IBS, LLC, regarding the classification,

under the Harmonized Tariff Schedule of the United States (HTSUS), of Cutting Edge™ Rolling Scissors. We have reconsidered NY I87124 and determined that the classification of the rolling scissors is not correct.

In NY I87124, Customs found that the rolling scissors was classified in subheading 8205.51.75, HTSUS, as other handtools, household tools, other. Customs has reviewed the matter and believes that the correct classification of the rolling scissors is in subheading 8205.51.30, HTSUS, as other handtools, household tools, of iron or steel, other.

FACTS:

The product involved is a Cutting Edge™ Rolling Scissors. The tool is comprised of circular steel blades with a plastic molded handle. The plastic handle is molded with a loop through which to place one's hand. The article is described as acting as a utility type knife. It is intended to work with giftwrap, wallpaper, shelf paper, freezer paper, blue prints, vinyl, plastic film, and many arts and crafts type functions. You state the name of the article is perhaps a misnomer. It does not operate as a traditional pair of scissors would. It has no pointed blades or sharp edges. It functions by rolling the cutting edge wheels along the cut line or pulling the material to be cut towards you, through the cutting edge.

ISSUE:

Whether the rolling scissors is a handtool of the household type of iron or steel?

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that most goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

Inspection of the rolling scissors reveals that it is a composite good made up of a plastic molded handle and a steel blade. Each of the components is described by different subheadings within heading 8205, HTSUS. Thus, GRI 6 applies.

The HTSUS subheadings under consideration are as follows:

8203	Files, rasps, pliers (including cutting pliers), pincers, tweezers, metal cutting shears, pipe cutters, bolt cutters, perforating punches and similar handtools, and base metal parts thereof:
8203.30.00	Metal cutting shears and similar tools, and parts thereof
8205	Handtools (including glass cutters) not elsewhere specified or included; blow torches and similar self-contained torches; vises, clamps and the like, other than accessories for and parts of machine tools; anvils; portable forges; hand- or pedal-operated grinding wheels with frameworks; base metal parts thereof:

	Other handtools (including glass cutters) and parts thereof:
8502.51	Household tools, and parts thereof:
	Of iron or steel:
8205.51.30	Other (including parts)
8205.51.75	Other

In your ruling request you stated that you believed the article should be classified in subheading 8203.30.00, HTSUS, as metal cutting shears and similar tools. However subheading 8203.30.00, HTSUS, is not for shears *made* of metal, but for shears *made to cut* metal. *See* EN 82.03 (C) and HQ 956093 (July 7, 1994). Therefore, subheading 8203.30.00, HTSUS, is not appropriate for the rolling scissors which are meant to cut paper and other light-weight materials.

Because the item is a composite good, we turn to GRI 3(b), applied at the subheading level by GRI 6, which states that when goods are *prima facie* classifiable under two or more (sub)headings, classification shall be effected as follows:

> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a) [by reference to the heading which provides the most specific description], shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

Under EN (VII) for Rule 3(b), goods are to be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

Under EN (VIII) for Rule 3(b), the factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods. Recent court decisions on the essential character for GRI 3(b) purposes have looked primarily to the role of the constituent material in relation to the use of the goods. *See, e.g., Better Home Plastics Corp. v. U.S.*, 916 F. Supp. 1265 (CIT 1996), *aff'd* 119 F.3d 969 (Fed. Cir. 1997) (holding the utilitarian role of a shower liner is more important than decorative value of the curtain sold with it); *Mita Copystar America, Inc. v. U.S.*, 966 F. Supp. 1245 (CIT 1997), *reh'g denied*, 994 F. Supp. 393 (1998).

Customs has previously determined that a similar article, a wheeled pizza cutter made with both metal and plastic components is classified in subheading 8205.51.30, HTSUS. *See* NY A89210 (November 8, 1996), HQ 951605 (June 1, 1992), and HQ 951881 (June 26, 1992). Another Customs ruling, HQ 950609 (January 7, 1992), involved a bottle opener with a plastic handle and a metal ring. Although the bottle opener had a plastic handle, it was described as having a metal working edge and, therefore, was classified as of iron or steel in subheading 8205.51.30, HTSUS.

We believe that the essential character of the rolling scissors is imparted by the steel blades. Without the steel blades, the article would not be able to accomplish its primary role or function as a cutting device. Therefore, since the essential character of the rolling scissors is determined by the steel com-

ponent, the classification of the article is in subheading 8205.51.30, HTSUS, as other handtools, household tools, of iron or steel, other.

HOLDING:

The rolling scissors is classified in subheading 8205.51.30, HTSUS, as other handtools, household tools, of iron or steel, other.

EFFECT ON OTHER RULINGS:

NY I87124 dated October 10, 2002, is **REVOKED.**

MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT I]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966656
CLA–2 RR:CR:GC 966656 KBR
CATEGORY: Classification
TARIFF NOS.: 8205.59.55

MR. MARK WEISBROD
PRESIDENT
THE BETTER MOUSE TRAP PEOPLE (B.C.) LTD.
111 Water Street - Unit 210
Vancouver, B.C.
Canada V6B 1A7

RE: Revocation of NY I87336; Three Prong Hook Grasping Tool

DEAR MR. WEISBROD:

This is in reference to New York Ruling Letter (NY) I87336, dated October 22, 2002, issued to you by the Customs National Commodity Specialist Division, regarding the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of a three prong hook grasping tool. We have reconsidered NY I87336 and determined that the classification of the three prong hook grasping tool is not correct.

In NY I87336, Customs found that the three prong hook grasping tool was classified in subheading 8205.59.80, HTSUS, as other handtools, other, other. Customs has reviewed the matter and believes that the correct classification of the three prong hook grasping tool is in subheading 8205.59.55, HTSUS, as other handtools, other, other, of iron or steel, other.

FACTS:

The product involved is a three prong hook grasping tool. The tool is described as a computer accessory/tool. The tool is 4½ inches long and pencil-like in shape. It has a plastic body with a plastic piston type plunger/button on top. When the button is pushed, three fine steel wires protrude out the bottom. As the wires extend, they open, basket-like. As the button is released, the wires retract and close, allowing them to grip a small article between the wires. The tool would normally be used to pick up small parts such as bolts, nuts or computer parts.

ISSUE:

Whether the three prong hook grasping tool is a handtool of iron or steel?

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that most goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

Inspection of the three prong hook grasping tool reveals that it is a composite good made up of a plastic body with three steel wires. Each of the components is described by a different subheading within heading 8205, HTSUS. Thus, GRI 6 applies.

The HTSUS subheadings under consideration are as follows:

8205	Handtools (including glass cutters) not elsewhere specified or included; blow torches and similar self-contained torches; vises, clamps and the like, other than accessories for and parts of machine tools; anvils; portable forges; hand- or pedal-operated grinding wheels with frameworks; base metal parts thereof:
	Other handtools (including glass cutters) and parts thereof:
8205.59	Other:
	Other:
	Other:
	Of iron or steel:
8205.59.55	Other
8205.59.80	Other

Because the item is a composite good, we turn to GRI 3(b), applied at the subheading level by GRI 6, which states that when goods are *prima facie* classifiable under two or more (sub)headings, classification shall be effected as follows:

> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a) [by reference to the heading which provides the most specific description], shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

Under EN (VII) for Rule 3(b), goods are to be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

Under EN (VIII) for Rule 3(b), the factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity,

weight or value, or by the role of a constituent material in relation to the use of the goods. Recent court decisions on the essential character for GRI 3(b) purposes have looked primarily to the role of the constituent material in relation to the use of the goods. *See, e.g., Better Home Plastics Corp. v. U.S.*, 916 F. Supp. 1265 (CIT 1996), *aff'd* 119 F.3d 969 (Fed. Cir. 1997) (holding the utilitarian role of a shower liner is more important than decorative value of the curtain sold with it); *Mita Copystar America, Inc. v. U.S.*, 966 F. Supp. 1245 (CIT 1997), *reh'g denied*, 994 F. Supp. 393 (1998).

Customs has previously determined that the essential character of other articles involving a plastic body with a metal working part was determined by the metal working part. HQ 950609 (January 7, 1992) involved a bottle opener with a plastic handle and a metal ring. Although the bottle opener had a plastic handle, it was described as having a metal working edge and, therefore, was classified as of iron or steel in subheading 8205.51.30, HTSUS. *See also* NY A89210 (November 8, 1996), HQ 951605 (June 1, 1992), and HQ 951881 (June 26, 1992) (all involving a wheeled pizza cutter made with both metal and plastic components being classified in subheading 8205.51.30, HTSUS).

We believe that the essential character of the three prong hook grasping tool is imparted by the steel wires. Without the steel wires, the article would not be able to accomplish its primary role or function as a grasping device. It is the steel wires that actually perform the grasping operation. Therefore, since the essential character of the three prong hook grasping tool is determined by the steel component, the classification of the article is in subheading 8205.59.55, HTSUS, as other handtools, other, other, of iron or steel, other.

HOLDING:

The three prong hook grasping tool is classified in subheading 8205.59.55, HTSUS, as other handtools, other, other, of iron or steel, other.

EFFECT ON OTHER RULINGS:

NY I87336 dated October 22, 2002, is **REVOKED.**

MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT J]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966657
CLA–2 RR:CR:GC 966657 KBR
CATEGORY: Classification
TARIFF NOS.: 8205.59.55

MR. MARK WEISBROD
PRESIDENT
THE BETTER MOUSE TRAP PEOPLE (B.C.) LTD.
111 Water Street - Unit 210
Vancouver, B.C.
Canada V6B 1A7

RE: Revocation of NY I87835; "Scrappin' Tracer" Tool

DEAR MR. WEISBROD:

This is in reference to New York Ruling Letter (NY) I87835, dated October 25, 2002, issued to you by the Customs National Commodity Specialist Division, regarding the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of a "Scrappin' Tracer" tool. We have reconsidered NY I87835 and determined that the classification of the Scrappin' Tracer tool is not correct.

In NY I87835, Customs found that the Scrappin' Tracer tool was classified in subheading 8205.59.80, HTSUS, as other handtools, other, other. Customs has reviewed the matter and believes that the correct classification of the Scrappin' Tracer tool is in subheading 8205.59.55, HTSUS, as other handtools, other, other, of iron or steel, other.

FACTS:

The product involved is a "Scrappin' Tracer" etching tool. The tool is 5¼ inches long and pencil-like in shape. It has a kiln dried wooden handle with a stainless steel needle protruding ½ inch out of one end. You state that the article is typically used for cutting paper using standard plastic stencils. You also state that the needle is sharpened to facilitate etching or cutting of paper, and that the tool actually scrapes rather than cuts paper.

ISSUE:

Whether the Scrappin' Tracer is a handtool of iron or steel?

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that most goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

Inspection of the Scrappin' Tracer reveals that it is a composite good made up of a wooden handle with a steel needle. Each of the components is described by different subheadings within heading 8205, HTSUS. Thus, GRI 6 applies.

The HTSUS subheadings under consideration are as follows:

8205	Handtools (including glass cutters) not elsewhere specified or included; blow torches and similar self-contained torches; vises, clamps and the like, other than accessories for and parts of machine tools; anvils; portable forges; hand- or pedal-operated grinding wheels with frameworks; base metal parts thereof:
	Other handtools (including glass cutters) and parts thereof:
8502.59	Other:
	Other:
	Other:
	Of iron or steel:
8205.59.55	Other
8205.59.80	Other

Because the item is a composite good, we turn to GRI 3(b), applied at the subheading level by GRI 6, which states that when goods are *prima facie* classifiable under two or more (sub)headings, classification shall be effected as follows:

> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a) [by reference to the heading which provides the most specific description], shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

Under EN (VII) for Rule 3(b), goods are to be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

Under EN (VIII) for Rule 3(b), the factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods. Recent court decisions on the essential character for GRI 3(b) purposes have looked primarily to the role of the constituent material in relation to the use of the goods. *See, e.g., Better Home Plastics Corp. v. U.S.*, 916 F. Supp. 1265 (CIT 1996), *aff'd* 119 F.3d 969 (Fed. Cir. 1997) (holding the utilitarian role of a shower liner is more important than decorative value of the curtain sold with it); *Mita Copystar America, Inc. v. U.S.*, 966 F. Supp. 1245 (CIT 1997), *reh'g denied*, 994 F. Supp. 393 (1998).

Customs has previously determined that the essential character of other articles involving a body of one material but with a metal working part, was determined by the metal working part. HQ 950609 (January 7, 1992) involved a bottle opener with a plastic handle and a metal ring. Although the bottle opener had a plastic handle, it was described as having a metal working edge and, therefore, was classified as of iron or steel in subheading 8205.51.30, HTSUS. *See also* NY A89210 (November 8, 1996), HQ 951605

(June 1, 1992), and HQ 951881 (June 26, 1992) (all involving a wheeled pizza cutter made with both metal and plastic components being classified in subheading 8205.51.30, HTSUS); and HQ 964640 (March 26, 2001) (involving a steel vegetable peeler with a rubber handle being classified in subheading 8205.51.30, HTSUS).

We believe that the essential character of the Scrappin' Tracer is imparted by the steel needle. Without the steel needle, the article would not be able to accomplish its primary role or function as an etching device. It is the steel needle that actually performs the etching operation. Therefore, since the essential character of the Scrappin' Tracer is determined by the steel component, the classification of the article is in subheading 8205.59.55, HTSUS, as other handtools, other, other, other, of iron or steel, other.

HOLDING:

The Scrappin' Tracer is classified in subheading 8205.59.55, HTSUS, as other handtools, other, other, other, of iron or steel, other.

EFFECT ON OTHER RULINGS:

NY I87835 dated October 22, 2002, is **REVOKED.**

MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT K]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966659
CLA–2 RR:CR:GC 966659 KBR
CATEGORY: Classification
TARIFF NOS.: 8205.59.55

MS. LISA HOLLAND
HELLMAN WORLDWIDE LOGISTICS
7280 Alum Creek Drive
Suites A-D
Columbus, OH 43217

RE: Revocation of NY I89237; Hoof Pick

DEAR MS. HOLLAND:

This is in reference to New York Ruling Letter (NY) I89237, dated December 13, 2002, issued to you by the Customs National Commodity Specialist Division, regarding the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of a hoof pick. We have reconsidered NY I89237 and determined that the classification of the hoof pick is not correct.

In NY I89237, Customs found that the hoof pick was classified in subheading 8205.59.80, HTSUS, as other handtools, other, other, other, other. Customs has reviewed the matter and believes that the correct classification of the hoof pick is in subheading 8205.59.55, HTSUS, as other handtools, other, other, other, of iron or steel, other.

FACTS:

The product involved is a hoof pick which is used to remove debris from horse hooves. It measures 6.65 inches long and 1.5 inches in width. It has a plastic handle which is 63% of the article's weight and a stainless steel hook extending out of one end which is 37% of the article's weight.

ISSUE:

Whether the hoof pick is a handtool of iron or steel?

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that most goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

Inspection of the hoof pick reveals that it is a composite good made up of a plastic handle with a stainless steel hook. Each of the components is described by different subheadings within heading 8205, HTSUS. Thus, GRI 6 applies.

The HTSUS subheadings under consideration are as follows:

7326	Other articles of iron or steel:
7326.90	Other
	Other
	Other
7326.90.85	Other
8205	Handtools (including glass cutters) not elsewhere specified or included; blow torches and similar self-contained torches; vises, clamps and the like, other than accessories for and parts of machine tools; anvils; portable forges; hand- or pedal-operated grinding wheels with frameworks; base metal parts thereof:
	Other handtools (including glass cutters) and parts thereof:
8502.59	Other:
	Other:
	Other:
	Of iron or steel:
8205.59.55	Other
8205.59.80	Other

Because the item is a composite good, we turn to GRI 3(b), applied at the subheading level by GRI 6, which states that when goods are *prima facie* classifiable under two or more (sub)headings, classification shall be effected as follows:

> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a) [by reference to the heading which provides the most specific description], shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

Under EN (VII) for Rule 3(b), goods are to be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

Under EN (VIII) for Rule 3(b), the factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods. Recent court decisions on the essential character for GRI 3(b) purposes have looked primarily to the role of the constituent material in relation to the use of the goods. *See, e.g., Better Home Plastics Corp. v. U.S.*, 916 F. Supp. 1265 (CIT 1996), *aff'd* 119 F.3d 969 (Fed. Cir. 1997) (holding the utilitarian role of a shower liner is more important than decorative value of the curtain sold with it); *Mita Copystar America, Inc. v. U.S.*, 966 F. Supp. 1245 (CIT 1997), *reh'g denied*, 994 F. Supp. 393 (1998).

You stated that you believed the hoof pick should be classified in subheading 7326.90.85, HTSUS. However, that subheading is a so called "basket provision" for classification of articles of iron or steel which are not classifiable elsewhere. Classification of the hoof pick in this subheading is precluded by operation of GRI 1 if the hoof pick can be more specifically classified elsewhere in the HTSUS. *See Apex Universal, Inc. v. United States*, CIT Slip Op. 98–69 (May 21, 1998))("Classification of imported merchandise in a basket provision is appropriate only when there is no tariff category that covers the merchandise more specifically [citations omitted]").

In comparison, heading 8205, HTSUS, is a specific provision for hand tools. EN 82.05(E)(7), specifically lists "hoof pickers" as a type of tool to be classified in this heading. Therefore, classification in heading 8205, HTSUS, is appropriate.

Customs has previously determined that the essential character of other articles involving a plastic body with a metal working part was determined by the metal working part. HQ 950609 (January 7, 1992) involved a bottle opener with a plastic handle and a metal ring. Although the bottle opener had a plastic handle, it was described as having a metal working edge and, therefore, was classified as of iron or steel in subheading 8205.51.30, HTSUS. *See also* NY A89210 (November 8, 1996), HQ 951605 (June 1, 1992), and HQ 951881 (June 26, 1992) (all involving a wheeled pizza cutter made with both metal and plastic components being classified in subheading 8205.51.30, HTSUS).

We believe that the essential character of the hoof pick is imparted by the stainless steel hook. Without the stainless steel hook, the article would not be able to accomplish its primary role or function as a device to remove debris from a horse's hoof. It is the stainless steel hook that actually performs the removal operation. Therefore, since the essential character of the hoof pick is determined by the stainless steel component, the classification of the article is in subheading 8205.59.55, HTSUS, as other handtools, other, other, other, of iron or steel, other.

HOLDING:

The hoof pick is classified in subheading 8205.59.55, HTSUS, as other handtools, other, other, other, of iron or steel, other.

EFFECT ON OTHER RULINGS:

NY I89237 dated December 13, 2002, is **REVOKED.**

MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT L]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966658
CLA–2 RR:CR:GC 966658 KBR
CATEGORY: Classification
TARIFF NOS.: 8205.51.60; 8205.51.75

MS. JENNIFER R. LAM
COMPLIANCE SUPERVISOR
FISKARS CONSUMER PRODUCTS, INC.
8300 Highland Drive
Wausau, WI 54401

RE: Modification of NY I89087; Paper Crimper

DEAR MS. LAM:

This is in reference to New York Ruling Letter (NY) I89087, dated December 17, 2002, issued to you by the Customs National Commodity Specialist Division, regarding the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of a standard paper crimper, model 9340 7097, and a wavy paper crimper, model 9341 7097. We have reconsidered NY I89087 and determined that the classification of the standard paper crimper is not correct.

In NY I89087, Customs found that both paper crimpers were classified in subheading 8205.51.75, HTSUS, as other handtools, household tools, other. Customs has reviewed the matter and believes that the correct classification of the standard paper crimper, model 9340 7097, is in subheading 8205.51.60, HTSUS, as other handtools, household tools, of aluminum.

FACTS:

The product involved is a standard paper crimper, model 9340 7097, which is intended for use in household paper crafting projects such as customizing cards. The standard paper crimper is used to create a corrugated pattern on paper up to 6½ inches wide. The standard paper crimper creates a straight line pattern in the paper.

The standard paper crimper, model 9340 7097, is comprised of a crimping wheel made of aluminum which is held onto a plastic handle by an aluminum rod. The aluminum contacts the paper to create a corrugated effect. You state that most of the weight and cost of both models is derived from the plastic component

ISSUE:

Whether the standard paper crimper is a household tool of aluminum or plastic?

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

Inspection of the standard paper crimper reveals that it is a composite good made up of a plastic handle with an aluminum crimping wheel and attachment rod. Each of the components is described by different subheadings within heading 8205, HTSUS. Thus, GRI 6 applies.

The HTSUS subheadings under consideration are as follows:

8205	Handtools (including glass cutters) not elsewhere specified or included; blow torches and similar self-contained torches; vises, clamps and the like, other than accessories for and parts of machine tools; anvils; portable forges; hand- or pedal-operated grinding wheels with frameworks; base metal parts thereof:
	Other handtools (including glass cutters) and parts thereof:
8205.51	Household tools, and parts thereof:
8205.51.60	Of aluminum
8205.51.75	Other

Because the item is a composite good, we turn to GRI 3(b), applied at the subheading level by GRI 6, which states that when goods are *prima facie* classifiable under two or more (sub)headings, classification shall be effected as follows:

> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a) [by reference to the heading which provides the most specific description], shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

Under EN (VII) for Rule 3(b), goods are to be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

Under EN (VIII) for Rule 3(b), the factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods. Recent court decisions on the essential character for GRI 3(b) purposes have looked primarily to the role of the constituent material in re-

lation to the use of the goods. *See, e.g., Better Home Plastics Corp. v. U.S.*, 916 F. Supp. 1265 (CIT 1996), *aff'd* 119 F.3d 969 (Fed. Cir. 1997) (holding the utilitarian role of a shower liner is more important than decorative value of the curtain sold with it); *Mita Copystar America, Inc. v. U.S.*, 966 F. Supp. 1245 (CIT 1997), *reh'g denied*, 994 F. Supp. 393 (1998).

Customs has previously determined that the essential character of other articles involving a plastic body with a metal working part was determined by the metal working part. HQ 950609 (January 7, 1992) involved a bottle opener with a plastic handle and a metal ring. Although the bottle opener had a plastic handle, it was described as having a metal working edge and, therefore, was classified as of iron or steel in subheading 8205.51.30, HTSUS. *See also* NY A89210 (November 8, 1996), HQ 951605 (June 1, 1992), and HQ 951881 (June 26, 1992) (all involving a wheeled pizza cutter made with both metal and plastic components being classified in subheading 8205.51.30, HTSUS).

We believe that the essential character of the standard paper crimper, model 9340 7097, is imparted by the aluminum crimping wheel. Without the aluminum crimping wheel, the article would not be able to accomplish its primary role of crimping paper. It is the aluminum wheel that actually performs the crimping operation. Therefore, since the essential character of the standard paper crimper, model 9340 7097, is determined by the aluminum component, the classification of the standard paper crimper is in subheading 8205.51.60, HTSUS, as other handtools, household tools, of aluminum. H

HOLDING:

The standard paper crimper, model 9340 7097, is classified in subheading 8205.51.60, HTSUS, as other handtools, household tools, of aluminum.

EFFECT ON OTHER RULINGS:

NY I89087 dated December 17, 2002, is **MODIFIED.**

MYLES B. HARMON,
Director,
Commercial Rulings Division.

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19 CFR PART 177

REVOCATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERTAIN LAMPWORKED GLASS ARTICLES KNOWN AS "ECOSPHERES"

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security

ACTION: Notice of revocation of ruling letter and revocation of treatment relating to tariff classification of certain lampworked glass spheres known as "ecospheres."

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Imple-

mentation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling letter pertaining to the tariff classification of lampworked glass spheres known as "ecospheres" under the Harmonized Tariff Schedule of the United States ("HTSUS"). Customs also is revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed actions was published in the Customs Bulletin on August 6, 2003. No comments were received in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after December 15, 2003.

FOR FURTHER INFORMATION CONTACT: Robert Dinerstein, General Classification Branch, (202) 572–8721.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), a notice was published in the Customs Bulletin on August 6, 2003, proposing to modify NY I84003, dated April 5, 2002, regarding the classification of lampworked articles known as "ecospheres." No comments were received in response to the notice.

As stated in the proposed notice, this revocation will cover any rulings on the subject merchandise which may exist but which have not been specifically identified. Any party who has received an interpre-

tive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule. Any person involved in substantially identical transactions should have advised Customs during the comment period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NY I84003, and any other ruling not specifically identified in order to reflect the proper classification of the lampworked glass articles known as "ecospheres" pursuant to the analysis set forth in HQ 966442. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

DATED: September 25, 2003

John E. Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachment

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966442
September 25, 2003
CLA–2 RR:CR:GC 966442 RSD
CATEGORY: Classification
Tariff No. 7018.90.50

STEPHEN S. SPRAITZAR, ESQ.
LAW OFFICES OF GEORGE R. TUTTLE
Three Embarcadero Center
Suite 1160
San Francisco, California 94111

RE: Revocation of NY I84003; Ecospheres; Lamp-Worked Glass; Ornaments

DEAR MR. SPRAITZAR:

This is in response to your letter dated February 27, 2003, on behalf of Ecosphere Associates, Inc., requesting reconsideration of New York Ruling Letter (NY) NY I84003 dated August 2, 2002, concerning the tariff classification of a glass article known as an "ecosphere." Two samples of the ecosphere were submitted. You made a supplemental submission dated April 14, 2003. In addition, you submitted a video on a CD-Rohm to demonstrate how the ecosphere is made. An accompanying e-mail further explained the process. After review of NY I84003, Customs has determined that the classification of the ecospheres under subheading 7013.99.50, HTSUS, was incorrect.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), a notice was published on August 6, 2003, in the CUSTOMS BULLETIN, Volume 37, Number 32, proposing to revoke NY 184003. No comments were received in response to this notice.

FACTS:

The imported merchandise is a glass sphere with a small glass plug that is used as a cover. After importation, the importer fills the glass sphere with water, active microorganisms, bright red shrimp, and algae. The importer then seals the sphere with the hole cover. The finished products are thereafter sold to consumers, universities and schools for display.

The video that you submitted shows that the first step in producing the ecospheres is the arrival of borosilicate glass tubes at the glass factory. You indicate that borosilicate tubes have a nominal diameter of nine (9) millimeters. The tubes are segmented and then heated over a liquid propane gas burner until they reach a molten state. The molten glass is pulled to create long tubular sections at the ends. These ends will be used later as hand holds for post-processing. The glass worker attaches a flexible tube to the segmented glass tubes. During this sequence, the glass acquires a spherical shape as a result of the air being blown into it. By this process, the articles are made by hand.

One of the handles on the glass is then removed. Next, the flat base is formed. After that, using a graphite form tool plug, a hole is formed. This plug creates the specific size of the hole. The glass sphere is then mounted onto a finger-type holder so that the last remaining handle segment can be

removed and the top rounded. The sphere is then dismounted from the finger holder and is placed onto a graphite holding tool. The glass sphere is then placed into a wire basket with other parts that will then go into the annealing oven, where an even heating and cooling will remove any stresses that may cause the glass to crack. Based on the video, it appears that except for the annealing in an oven, all the processing done to make the glass spheres is performed over an open flame.

ISSUE:

Are the glass ecospheres classified as other glassware in subheading 7013.99.50, HTSUS, or as statuettes and other ornaments of lamp-worked glass, other, other in subheading 7018.90.50, HTSUS?

LAW AND ANALYSIS:

Classification under the Harmonized Tariff Schedule of the United States (HTSUS) is made in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The Harmonized Commodity Description And Coding System Explanatory Notes (EN's) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the EN's provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the system. Customs believes the EN's should always be consulted. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The HTSUS provisions under consideration are as follows:

7013	Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018):
	Other glassware:
7013.99	Other:
	Other:
	Other:
7013.99.50	Valued over $0.30 but not over $3 each.
* * * * * * * * * * * *	
7018	Glass beads, imitation pearls, imitation precious or semiprecious stones and similar glass smallwares and articles thereof other than imitation jewelry; glass eyes other than prosthetic articles; statuettes and other ornaments of lamp-worked glass, other than imitation jewelry; glass microspheres not exceeding 1 mm in diameter:

7018.90	Other:
7018.90.50	Other.

* * * * * * * * * * *

There is no question that the articles are classifiable in Chapter 70, HTSUS, which provides for articles of glass (we note that in *Los Angeles Tile Jobbers, Inc. v. United States*, 63 Cust. Ct. 248, C.D. 3904 (1969), the Court stated that "all articles of glass are generally defined as 'glassware' " (63 Cust. Ct. at 250; citing Webster's Third New International Dictionary, Merriam-Webster (1968); see also Webster's New World Dictionary, Third College Edition, Webster's New World, at 573 (1988), defining "glassware" as "articles made of glass"). What must be determined is which subheading within Chapter 70 best describes the articles.

The fundamental issue is whether the ecospheres are articles of lamp-worked glass classified in heading 7018, HTSUS. The national import specialist, in reviewing the sample glass spheres, noted that they are substantially different from the typical product claimed to be a lamp-worked ornament of heading 7018, HTSUS. In a memorandum, he explained that generally, lamp-worked ornaments are very small (e.g., small glass flowers, candies or animals).

In Headquarters Ruling Letter (HQ) 950837, dated May 4, 1992, we analyzed the term "lamp-working" as used in heading 7018, HTSUS, and reviewed several authorities on glass working to better understand the meaning of the term "lamp-worked glass." In HQ 950837, we first pointed out that a dictionary definition of lamp-working states that:

> it is the process of fashioning objects from glass tubing and cane softened to workability over the flame of a small lamp. The definition states that it should be compared with glassblowing, which is defined as an art of shaping a mass of glass by inflating it through a tube after the glass has been heated to a viscid state. Webster's Third New International Dictionary.

We next looked at a specific book on lamp-working called In Flameworking-Glassmaking for the Craftsman, Chilton Haynes (1968), by Frederic Schuler, and quoted the following language regarding lampworking, on page 7:

> the technique of flameworking, or reheating glass rod or tubing or other pieces of glass, was once called "lampworking." This method was used as early as 1660 to shape microscope lenses; the simple burners were derived from small oil lamps. With this technique, the glass was heated in a relatively small area where pieces were to be sealed, enlarged, or changed in some manner. The cool ends of the glass were held in the hands, which controlled the rotation and position of the fluid central portion. Today, with a simple workbench, a few tools, and burner which uses gas with oxygen or air, this procedure shapes marvelous jewels of glass in a direct manner.

Another resource that we examined was In Phaidon Guide to Glass, Prentice Hall (1987), by Felice Mehlman. In that book, lampworking is defined as follows on page 13:

> working at the lamp for making small glass objects such as toys, trinkets and beads, the craftsman would work "at the lamp", where rods of annealed glass could be heated in the concentrated flame of an oil lamp (or later, a Bunsen burner) and shaped by tools.

Based on these authorities, in HQ 950837 we summarized our position on lamp-working as:

> The technique and the types of equipment used should define lampworking. Given the variety of forms a "blow lamp" may now take, if a glassworker softens glass rods and manipulates them over an oil lamp, a Bunsen burner or any other "lamp" producing a hot flame, this method of glass shaping should be considered "working at the lamp".

In considering the ecospheres, we looked at a recent authority on glass working entitled Advanced Glassworking Techniques, Glass Mountain Press (2003), by Edward T. Schmid, which defines "lamp-working" as the "process of heating up glass over a torch. Often incorporating the use of rods and tubing to create works of art. Often (although not limited to) smaller scaled piece of incredible detail and complexity."

With this information as guidance, we reviewed the background material submitted on the ecospheres and carefully watched the video that you submitted. The video shows that the glass used to make the ecospheres is continuously melted and manipulated over an open flame. The glass workers use a blowpipe to create the spherical shape of the ecosphere. Based on the video, it appears that when the blowpipe is being used, the glass is still heated over a flame. In fact, the only step involved in making the glass sphere that is not done over a flame is the annealing process, which is done in an oven. However, the annealing is only a finishing operation that prevents the glass spheres from cracking, and it is done after the ecospheres have already acquired their final shape and dimensions. It is our position that the annealing process done in this case as a finishing operation would not disqualify the ecospheres from being considered lamp-worked glass.

Although the ecospheres may not resemble typical lamp-worked pieces, they are nevertheless produced through the continuous heating and shaping or manipulating of glass tubing over a torch/open flame. Thus, in consideration of the specific information and evidence that you have presented, we are satisfied that they are made as a result of a lamp-working process.

However, in order to be classified in heading 7018, the articles must also be described as statuettes and other ornaments of lamp-worked glass. The EN's for heading 7018 indicate that the heading includes:

> Statuettes and other ornaments (other than imitation jewelry) obtained by working glass in the pasty state with a blow-pipe. These articles are designed for placing on shelves (animals, plants, statuettes, etc.). They are generally made of clear glass (lead crystal, strass etc.) or "enamel" glass.

You contend that the flat bottom on the sphere indicates that the ecospheres are intended to be placed on a flat surface such as a shelf. In addition, these glass spheres are designed to be filled with water, microorganisms, bright red shrimp and algae after importation, so that purchasers can display them for aesthetic purposes. Moreover, the items are made of clear

glass. Therefore, we consider the ecospheres to be ornaments within heading 7018, HTSUS.

Accordingly, we find that the ecospheres are classified in heading 7018, HTSUS. More specifically, the pieces are classified in subheading 7018.90.50, HTSUS, which provides for ". . . other ornaments of lamp-worked glass . . . Other: Other."

HOLDING:

The subject ecospheres are classified in subheading 7018.90.50, HTSUS, as ". . . . other ornaments of lamp-worked glass. . : Other: Other."

EFFECT ON OTHER RULINGS:

NY I84003 dated August 2, 2002 is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

John E. Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

REVOCATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF FOOTWEAR UPPERS

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of ruling letters and revocation of treatment relating to tariff classification of footwear uppers.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs and Border Protection (CBP) is revoking three ruling letters pertaining to the tariff classification, under the Harmonized Tariff Schedule of the United States ("HTSUS"), of footwear uppers. Similarly CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed actions was published in the Customs Bulletin on July 16, 2003. No comments were received in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after December 15, 2003.

FOR FURTHER INFORMATION CONTACT: Joe Shankle, Penalties Branch (202) 572–8824.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), a notice was published in the Customs Bulletin on July 16, 2003, proposing to revoke Headquarters Ruling Letter (HQ) 958056, dated August 28, 1995, HQ 958966, dated March 26, 1997, and New York Ruling Letter (NY) H87189, dated February 15, 2002, involving the classification of footwear uppers. No comments were received in response to the notice. As stated in the proposed notice, these revocations will cover any rulings on the subject merchandise which may exist but which have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBP's previous interpretation of the Harmonized Tariff Schedule. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may

raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

Pursuant to 19 U.S.C. 1625(c)(1), CBP is revoking HQ 958056, HQ 958966, and NY H87189, and any other ruling not specifically identified in order to reflect the proper classification of footwear uppers pursuant to the analysis set forth in HQ 966539 (Attachment A), HQ 966540 (Attachment B), and HQ 966148 (Attachment C). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

DATED: September 26, 2003

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966539
September 26, 2003
CLA–2:RR:CR:TE JFS
CATEGORY: Classification
TARIFF NO.: 6406.10.6500

MS. DIANE S. NICHOLS
COLE-HAHN
One Cole-Hahn Drive
Yarmouth, ME 04096–1515

Re: Revocation of HQ 958056; Not Formed Uppers

DEAR MS. NICHOLS:

This is to notify you that the Bureau of Customs and Border Protection (CBP) has reconsidered Headquarters Ruling Letter (HQ) 958056, issued to you August 28, 1995, wherein CBP classified a leather shoe upper in subheading 6406.10.1000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). For the reasons that follow, this ruling revokes HQ 958056.

Pursuant to section 625(c)(1) Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–82, 107 Stat. 2057, 2186), notice of the proposed revocation of HQ 958056, was published on July 16, 2003, in the *CUSTOMS BULLETIN, Volume 37, Number 29.*

As explained in the notice, the period within which to submit comments on this proposal ended on August 18, 2003. No comments were received in response to this notice.

FACTS:

In HQ 958056, the shoe upper under consideration was described as follows:

> Sample "woven black" is a leather upper created from leather strips woven and shaped on a last, which is stitched to the bottom of a grain leather "underfoot," resulting in a fully closed bottom. A full length cardboard insole is then inserted into this upper and is held to it, in the rear, by multiple tacks throughout the bottom of the woven leather upper and grain leather "underfoot" into the cardboard. A round hole measuring approximately 2 cm in diameter (the size of a nickel) has been cut out through the leather underfoot and the cardboard insole near the front of this upper's otherwise completely closed bottom.

The upper was classified in subheading 6406.10.1000, HTSUSA, which provides for "Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Uppers and parts thereof, other than stiffeners: Formed uppers: Of leather or composition leather: For other persons."

ISSUE:

Whether an upper with a nickel-sized hole cut out of the bottom has a "closed bottom."

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

> Additional U.S. Note 4 to chapter 64, HTSUS, provides as follows:
>
> Provisions of subheading 6406.10 for "formed uppers" cover uppers, with closed bottoms, which have been shaped by lasting, molding or otherwise but not by simply closing at the bottom.

CBP has generally strictly interpreted Additional U.S. Note 4 and held that if the bottoms of uppers have a hole cut out of them, they are not closed and the uppers are not formed. Most recently, in HQ 561499, CBP ruled that sandals with a plastic footbed in which a nickel-sized hole cut out of the footbed and mid-sole, which would be plugged after importation, did not have closed bottoms. CBP relied on HQ 087458, dated September 19, 1990; HQ 085573, dated December 28, 1989; and HQ 085291, dated March 1, 1990, wherein CBP ruled that because the bottoms had holes, the uppers did not have "closed bottoms."

For additional rulings finding that uppers are not formed because their bottoms are not closed, see NY 887332, dated July 15, 1993 (leather upper fully lasted to cardboard insole, which is then mostly cut out ruled to be not formed); HQ 089764, dated August 15, 1991 (upper that was front lasted,

but not back lasted, and had two holes in the bottom ruled to be not formed); HQ 088483, dated March 19, 1991 (unlasted upper with 3 inch long hole in bottom ruled as not being formed); HQ 085291, dated March 1, 1990 (moccasins with opening in bottoms ruled as not being formed); and HQ 085573, dated December 12, 1989 (leather uppers with opening cut out of bottoms ruled as not being formed); NY F88270, dated June 16, 2000; NY F86334, dated May 4, 2000; NY F82881, dated February 28, 2000; NY F82848, dated February 28, 2000; and NY E88143, dated November 10, 1999.

However, in HQ 958056 and HQ 958966, dated March 26, 1997, CBP ruled that an otherwise formed upper would be classified as formed despite having a hole cut out of its bottom. CBP overlooked the closed bottoms requirement because the uppers were substantially shaped and attached to a footbed. These rulings ignored the plain language of Note 4, requiring formed uppers to have "closed bottoms." Instead the focus was on the extent of formation of the upper. If the upper was fully formed, but for the hole cut out of the bottom, or the upper had a substantial bottom, albeit with a hole cut out of it, the uppers were considered "formed." These rulings are inconsistent with our interpretation and application of Note 4, which requires that formed uppers have closed bottoms. Accordingly, concurrent with this ruling, CBP is revoking HQ 958966.

The bottom of the instant upper is not closed because of the nickle sized hole. Accordingly, we find that the instant upper is not a "formed upper."

HOLDING:

HQ 958056, dated August 28, 1995, is hereby revoked. The subject merchandise is classified in subheading 6406.10.6500, HTSUSA, which provides, for "Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Uppers and parts thereof, other than stiffeners: Other: Of leather." The general column one duty rate is Free.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Gail A. Hamill for MYLES HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966540
September 26, 2003
CLA–2:RR:CR:TE JFS
CATEGORY: Classification
TARIFF NO.: 6406.10.6500

MR. RUSSEL BINNING
PIONEER SHOE CORP.
10788 Monte Vista Ave.
Ontario, CA 91763

Re: Revocation of HQ 958966; Not Formed Uppers

DEAR MR. BINNING:

This is to notify you that the Bureau of Customs and Border Protection (CBP) has reconsidered Headquarters Ruling Letter (HQ) 958966, issued to you March 26, 1997, wherein CBP classified a leather shoe upper for a work boot in subheading 6406.10.1000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). For the reasons that follow, this ruling revokes HQ 958966.

Pursuant to section 625(c)(1) Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–82, 107 Stat. 2057, 2186), notice of the proposed revocation of HQ 958966, was published on July 16, 2003, in the *CUSTOMS BULLETIN, Volume 37, Number 29*. As explained in the notice, the period within which to submit comments on this proposal ended on August 18, 2003. No comments were received in response to this notice.

FACTS:

In HQ 958966, the shoe upper under consideration was described as follows:

> [T]he leather upper is fully cement lasted to a cardboard insole with a 1/4 inch thick full plastic-rubber midsole and a ½ inch thick partial heel. The PVC mid-sole filler has a 1-¼ inch in diameter round hole cut in the bottom. You indicate that once these uppers are imported into the United States, additional materials and processing are required to close the bottom. Specifically, a twelve step injection carousel molds a thermal plastic outsole to the upper. You further indicate that this process requires a four man team of specially trained technicians and accounts for about 65% of the cost of the finished goods.

The upper was classified in subheading 6406.10.1000, HTSUSA, which provides for "Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Uppers and parts thereof, other than stiffeners: Formed uppers: Of leather or composition leather: For other persons."

ISSUE:

Whether an upper with a 1-¼ inch hole cut out of the bottom has a "closed bottom."

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

Additional U.S. Note 4 to chapter 64, HTSUS, provides as follows:

> Provisions of subheading 6406.10 for "formed uppers" cover uppers, with closed bottoms, which have been shaped by lasting, molding or otherwise but not by simply closing at the bottom.

The upper under consideration in HQ 958966 was fully shaped by cement lasting. Thus, the only issue was whether, by virtue of the 1-¼ inch hole cut out of the mid-sole, the upper was considered to have a bottom that was not closed.

CBP has generally strictly interpreted Additional U.S. Note 4 and held that if the bottoms of uppers have a hole cut out of them, they are not closed and the uppers are not formed. Most recently, in HQ 561499, CBP ruled that sandals with a plastic footbed in which a nickel-sized hole cut out of the footbed and mid-sole, which would be plugged after importation, did not have closed bottoms. CBP relied on HQ 087458, dated September 19, 1990; HQ 085573, dated December 28, 1989; and HQ 085291, dated March 1, 1990, wherein CBP ruled that because the bottoms had holes, the uppers did not have "closed bottoms."

For additional rulings finding that uppers are not formed because their bottoms are not closed, see NY 887332, dated July 15, 1993 (leather upper fully lasted to cardboard insole, which is then mostly cut out ruled to be not formed); HQ 089764, dated August 15, 1991 (upper that was front lasted, but not back lasted, and had two holes in the bottom ruled to be not formed); HQ 088483, dated March 19, 1991 (unlasted upper with 3 inch long hole in bottom ruled as not being formed); HQ 085291, dated March 1, 1990 (moccasins with opening in bottoms ruled as not being formed); and HQ 085573, dated December 12, 1989 (leather uppers with opening cut out of bottoms ruled as not being formed); NY F88270, dated June 16, 2000; NY F86334, dated May 4, 2000; NY F82881, dated February 28, 2000; NY F82848, dated February 28, 2000; and NY E88143, dated November 10, 1999.

However, in HQ 958966 and HQ 958056, dated August 28, 1995, CBP ruled that an otherwise formed upper would be classified as formed despite having a hole cut out of its bottom. CBP overlooked the closed bottoms requirement because the uppers were substantially shaped and attached to a footbed. These rulings ignored the plain language of Note 4, requiring formed uppers to have "closed bottoms." Instead the focus was on the extent of formation of the upper. If the upper was fully formed, but for the hole cut out of the bottom, or the upper had a substantial bottom, albeit with a hole cut out of it, the uppers were considered "formed." These rulings are incon-

sistent with our interpretation and application of Note 4, which requires that formed uppers have closed bottoms. Accordingly, concurrent with this ruling, CBP is revoking HQ 958056.

The bottom of the instant upper is not closed because of the 1-¼ inch hole. Accordingly, we find that the instant upper is not a "formed upper."

HOLDING:

HQ 958966, dated March 26, 1997, is hereby revoked. The subject merchandise is classified in subheading 6406.10.6500, HTSUSA, which provides, for "Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Uppers and parts thereof, other than stiffeners: Other: Of leather." The general column one duty rate is Free.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Gail A. Hamill for MYLES HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966148
September 26, 2003
CLA–2:RR:CR:TE 966148 JFS
CATEGORY: Classification
TARIFF NO.: 6406.10.6000

MR. JIM HOFFMAN
HOFFMAN BOOTS
100 E. Riverside
Kellogg, ID 83837

Re: Revocation of NY H87189; Not Formed Uppers

DEAR MR. HOFFMAN:

This is in response to your request for reconsideration of New York Ruling Letter (NY) H87189, dated February 15, 2002, wherein the Bureau of Customs and Border Protection (CBP) classified uppers to be used in the manufacture of boots in subheading 6406.10.50, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). For the reasons that follow, this ruling revokes NY H87189.

Pursuant to section 625(c)(1) Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–82, 107 Stat. 2057, 2186), notice of the proposed revocation of NY H87189, was published on July 16, 2003, in the *CUSTOMS BULLETIN, Volume 37, Number 29.* As explained in the notice, the period within which to submit comments on

this proposal ended on August 18, 2003. No comments were received in response to this notice.

FACTS:

The article under consideration is an upper used in the construction of heavy-duty boots known as "calks" that are worn by loggers in the logging industry. The upper is fully lasted and is attached to a footbed that is composed of four layers. Attached to the footbed is a midsole that is composed of rubber that is ¼ of an inch thick. A ¾ inch diameter hole has been cut through the footbed and midsole. This hole will be plugged after the upper is imported into the United States.

On June 25, 2001, CBP issued H82672 to Tower Group International, on behalf of Hoffman Boots. The upper under consideration in that ruling was nearly identical to the instant upper, except that it did not have a hole punched out of the heel portion of the footbed and midsole. CBP classified that upper as a "formed upper" in subheading 6406.10.50, HTSUSA, with a duty rate of 26.2 percent *ad valorem*.

In NY H87189, the subject upper was also considered to be "formed" and was classified in subheading 6406.10.50, HTSUSA, which provides, in part, for: "Parts of footwear . . . and parts thereof: Uppers and parts thereof, other than stiffeners: Formed Uppers: Other: Other."

You contend the upper with the hole should be classified in subheading 6406.10.6000, HTSUSA, which provides, in part, for Parts of footwear . . . and parts thereof: Uppers and parts thereof, other than stiffeners: Other: Of rubber or plastics. The general column one rate of duty is Free.

ISSUE:

Whether an upper with a nickel-sized hole cut out of the bottom has a "closed bottom."

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

Additional U.S. Note 4 to chapter 64, HTSUS, provides as follows:

> Provisions of subheading 6406.10 for "formed uppers" cover uppers, with closed bottoms, which have been shaped by lasting, molding or otherwise but not by simply closing at the bottom.

The instant upper has been fully shaped by lasting and molding. Thus, the only issue is whether, by virtue of the nickel-sized hole cut out of the footbed and mid-sole, the upper is considered to have a closed bottom.

CBP has generally strictly interpreted Additional U.S. Note 4 and held that if the bottoms of uppers have a hole cut out of them, they are not closed and the uppers are not formed. Most recently, in HQ 561499, CBP ruled that sandals with a plastic footbed in which a nickel-sized hole cut out of the footbed and mid-sole, which would be plugged after importation, did not have closed bottoms. CBP relied on HQ 087458, dated September 19, 1990; HQ 085573, dated December 28, 1989; and HQ 085291, dated March 1,

1990, wherein CBP ruled that because the bottoms had holes, the uppers did not have "closed bottoms."

For additional rulings finding that uppers are not formed because their bottoms are not closed, see NY 887332, dated July 15, 1993 (leather upper fully lasted to cardboard insole, which is then mostly cut out ruled to be not formed); HQ 089764, dated August 15, 1991 (upper that was front lasted, but not back lasted, and had two holes in the bottom ruled to be not formed); HQ 088483, dated March 19, 1991 (unlasted upper with 3 inch long hole in bottom ruled as not being formed); HQ 085291, dated March 1, 1990 (moccasins with opening in bottoms ruled as not being formed); and HQ 085573, dated December 12, 1989 (leather uppers with opening cut out of bottoms ruled as not being formed); NY F88270, dated June 16, 2000; NY F86334, dated May 4, 2000; NY F82881, dated February 28, 2000; NY F82848, dated February 28, 2000; and NY E88143, dated November 10, 1999.

However, CBP has ruled that an otherwise formed upper would be classified as formed despite having a hole cut out of its bottom. In HQ 958966, dated March 26, 1997, and HQ 958056, dated August 28, CBP overlooked the closed bottoms requirement because the uppers were substantially shaped and attached to a footbed. These rulings ignored the plain language of Note 4, requiring formed uppers to have "closed bottoms." Instead the focus was on the extent of formation of the upper. If the upper was fully formed, but for the hole cut out of the bottom, or the upper had a substantial bottom, albeit with a hole cut out of it, the uppers were considered "formed." These rulings are inconsistent with our interpretation and application of Note 4, which requires that formed uppers have closed bottoms. Accordingly, concurrent with this ruling, CBP is revoking HQ 958966 and HQ 958056.

The bottom of the instant upper is not closed because of the nickle sized hole. Accordingly, we find that the instant upper is not a "formed upper."

HOLDING:

NY H87189, dated February 25, 2002, is hereby revoked. The subject merchandise is classified in subheading 6406.10.6000, HTSUSA, which provides, for "Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Uppers and parts thereof, other than stiffeners: Other: Of rubber or plastics." The general column one duty rate is Free.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Gail A. Hamill for MYLES HARMON,
Director,
Commercial Rulings Division.

19 CFR PART 177

PROPOSED REVOCATION OF DECISION CONCERNING EFFECTIVE DUTY RATE FOR IMPORTED MERCHANDISE SUBJECT TO A TARIFF-RATE QUOTA

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of a decision relating to the effective duty rate applicable to imported merchandise subject to a tariff-rate quota.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs and Border Protection (CBP) intends to revoke a decision concerning the effective rate of duty applicable to merchandise that is subject to a tariff-rate quota. Comments are invited on the correctness of the intended revocation.

DATE: Comments must be received on or before November 15, 2003.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, NW., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799 9th Street, NW., Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Russell Berger, Entry Procedures and Carriers Branch, (202) 572–8718.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations.

Accordingly, the law imposes a greater obligation on Customs (now Customs and Border Protection (CBP)) to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws.

In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify, and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act off 1930, as amended (19 U.S.C. 1625(c)(1)), this notice advises interested parties that CBP intends to revoke a decision relating to the effective duty rate to be applied to imported merchandise under a tariff-rate quota. Although in this notice CBP expressly references a protest review decision, HQ 958810, dated December 4, 1996 (Attachment A), this notice covers any other rulings also meriting revocation to the same extent which may exist but which have not been explicitly identified.

Toward this end, CBP has made reasonable efforts to search existing databases for other rulings in addition to the decision identified. However, no further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue the subject of this notice, should so advise CBP during this notice period.

Specifically, in HQ 958810, the entry summaries for certain goods (fresh tomatoes) that were subject to a tariff-rate quota were not correctly annotated when filed to reflect that the entries were quota entries. This resulted in the tomatoes not being reported for quota at that time, and thus the tomatoes were not accorded quota status entitling them to the lower (in-quota) rate of duty which was then in effect. When Customs, on its own initiative, later discovered and corrected this error, the quota had already been filled, so the higher (over-quota) rate was applied to the goods. However, in HQ 958810, it was held that the in-quota rate of duty in effect when the entries were made was rightly applicable to the merchandise.

It is the position of CBP that in HQ 958810 the entries should have been processed under the over-quota rate of duty.

Therefore, pursuant to 19 U.S.C. 1625(c)(1), CBP intends to revoke HQ 958810, and any other ruling not specifically identified, in order to reflect the higher rate of duty properly applicable to the subject merchandise consistent with the analysis contained in proposed Headquarters ruling (HQ) 115991 (Attachment B). Before taking

this action, however, consideration will be given to any written comments that are timely received.

DATED: September 29, 2003

LARRY L. BURTON,
Director,
International Trade Compliance Division.

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
Washington, D.C., December 4, 1996.
QUO–1–RR:IT:EC 958810 LLB
Category: Quota

PORT DIRECTOR
U.S. CUSTOMS SERVICE
P.O. Box 3130
Laredo, Texas 78044

RE: Application for Further Review of Protest No. 2304–95–100179; Tariff rate quota; Incorrect entry type; Assignment of higher duty rate; Fresh tomatoes

DEAR SIR OR MADAM:

This is in response to your memorandum of December 27, 1995, forwarding the above-captioned matter for our review and appropriate action. We have considered the facts and issues raised and our decision follows:

FACTS:

Two entries of fresh tomatoes from Mexico were, at the time of their entry, subject to a tariff rate quota. The broker incorrectly indicated their entry type as 01 (non-quota) when they should have been shown to be type 02 (quota). Customs did not examine the entry documents at the time of entry and by the time that the entry type discrepancy was discovered, it was too late to reject the entries which were set to liquidate. Customs took action to "unset" the liquidation and correct the entries to show them as 02 types. During the period between the initial entries and their correction, the low duty rate quota had been filled and a higher duty rate was in effect. The higher rate was made applicable to the corrected entries. The quota period in question extended from March 1, 1995, through July 14, 1995, and the rate was changed on the entries in question during that quota period to reflect the rate applicable to the entries on the date of correction.

The fact of assignment of the higher rate of duty is the matter under protest. The protestant claims that the lower duty rate should apply since the entries were actually made when the lower rate was in effect.

ISSUE:

Whether the importer's protest seeking reliquidation because of a rate advance due to a claimed failure on the part of Customs to expeditiously examine and act upon entry documents should be approved.

LAW AND ANALYSIS:

The entry process includes a procedure for the correction of errors made in the entry of merchandise. Under the protest procedure of 19 U.S.C. 1514, errors in the classification, valuation, etc., of merchandise can be corrected, and reliquidation obtained with refund of overpaid duties, if the error is brought to the attention of the appropriate Customs officer within 90 days of the liquidation. Failure to file a protest within the prescribed period renders the liquidation final and binding on the importer and the government.

After expiration of the 90 day period, an importer can obtain a reliquidation of the entry and a refund of overpaid duties only in limited circumstances. Under 19 U.S.C. 1520(c)(1), an entry can be reliquidated to correct a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law. The error must be adverse to the importer and brought to the attention of the appropriate Customs officer within one year from the date of liquidation. The error must be manifest from the record or established by documentary evidence. This means that the nature of the error must be observable upon review of the record or upon submission of documentary evidence. In either event, the burden is on the petitioner to establish the nature of the error claimed and to demonstrate that it falls within the ambit of the statute.

In the present matter, a protest was filed some 87 days following the earliest of the liquidations under consideration. We find that despite the theories presented in this case, this is not a matter to be addressed under section 1520(c)(1). The protest statute itself (section 1514) is broadly drafted and interpreted, and relief of the type sought may be granted under its own terms.

In this case, the error was discovered by Customs based upon its own examination of the record at the time that initial liquidation was to occur. Our examination of the record reveals that there was no attempt on the part of the importer to benefit from a duty rate lower than that which was actually applicable to the tariff rate quota merchandise at the time that it was entered. To determine that the protest in this case should be denied would be to permit the government to benefit from its own failure to properly process the entry documents at the time of entry.

A different finding might result in a case involving an absolute quota. In this case there was no improper entry of merchandise into the commerce and no loss of revenue to the United States. In the case of an absolute quota, however, the incorrect statement of entry type to indicate non-quota merchandise could well result in prohibited importations. In such a case, a demand for redelivery would be made and a claim could be made against the surety. Additionally, action could be taken against a broker under 19 U.S.C. 1641.

HOLDING:

Following a thorough review of the facts as well as an analysis of the law and applicable precedents, we have determined that the protest under consideration should be granted. You are instructed to reliquidate the entries in question in accord with this determination.

JERRY C. LADERBERG,
Acting Chief,
Entry and Carrier Rulings Branch.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
Washington, D.C.
QUO–1–RR:IT:EC 115991 rb
Category: Quota

PORT DIRECTOR
CUSTOMS AND BORDER PROTECTION
P.O. Box 3130
Laredo, Texas 78044

Attention: Protest Section

RE: Merchandise subject to tariff-rate quota; Entry incorrectly designated as non quota; Quota filled when entry corrected; Over-quota duty rate applied to corrected entry; Reconsideration/Revocation of HQ 958810

DEAR SIR OR MADAM:

On December 4, 1996, we issued a decision, HQ 958810, in connection with an application for further review of a protest (no. 2304–95–100179). Based upon an examination of that protest review decision, we have concluded that the decision issued in that case was incorrect and should be revoked. The revocation ruling to this effect is set forth below.

FACTS:

Certain merchandise, as entered, was classified under a subheading of the Harmonized Tariff Schedule of the United States (HTSUS), that was subject to a tariff-rate quota. The entry summary for the merchandise was submitted electronically through the Automated Broker Interface (ABI). At the time the entry summary was filed, the lower (in-quota) rate of duty under the tariff-rate quota was in effect. However, instead of showing the entry to be type 02 (a quota entry), the broker incorrectly indicated the entry type on the entry summary for the merchandise as type 01 (a non-quota entry). This resulted in the merchandise not being reported for quota.

When Customs (now Customs and Border Protection (CBP)), on its own initiative, later discovered the error in the filed entry, it was too late to reject the entry under CBP's reject policy, so CBP took action at that time to correct the entry to reflect that it was a quota entry. When the error in the entry was discovered and corrected, the quantity of merchandise subject to the in-quota tariff rate had already been reached and the higher (over-quota) rate was then in effect. As a result, CBP applied the over-quota rate of duty to the merchandise under the corrected entry.

ISSUE:

Whether the imported merchandise was lawfully subject to the over-quota tariff rate of duty.

LAW AND ANALYSIS:

Tariff-rate quotas, in pertinent part, permit a specified quantity of merchandise to be entered for consumption at a reduced (in-quota) rate of duty during a designated period (§ 132.1(b), Customs Regulations; 19 CFR 132.1(b)). Once the quota is filled, merchandise that is imported in excess of the quantity admissible at the in-quota rate is permitted entry at the over-quota rate (§ 132.5(b), Customs Regulations; 19 CFR 132.5(b)).

The effective rates of duty for merchandise imported into the United States are governed by 19 U.S.C. 1315. Specifically, section 1315 provides, with exceptions not here relevant, that the effective rate or rates of duty on any article entered for consumption would be the rate or rates in effect when the documents comprising the entry for consumption (the entry summary) and any estimated duties then required to be paid have been deposited with the Customs Service (now CBP) by written, electronic or such other means, as prescribed by regulation.

In this respect, under § 132.11(b), Customs Regulations (19 CFR 132.11(b)), merchandise covered by an entry summary for consumption is regarded as entered for purposes of quota priority and shall acquire quota status (1) if the entry summary is in proper form, and duties have been attached to the entry summary; or (2), should the entry be filed electronically, if the entry summary for consumption is in proper form, and the entry/entry summary information along with a valid scheduled statement date have been successfully received electronically via the Automated Broker Interface (ABI) (see also 19 CFR 132.1(d),, 132.11(a), 132.11a, 141.64, and 141.68(d)). In this context, "quota priority" is the precedence granted to one entry or withdrawal for consumption of quota-class merchandise over other entries or withdrawals of merchandise subject to the same quota; and "quota status" in this context refers to the standing that entitles quota-class merchandise to a reduced rate of duty under a tariff-rate quota (19 CFR 132.1(f) and (g)).

In the instant case, the entry summary was not presented to CBP "in proper form," as required by the Customs Regulations, *supra*, because the broker erroneously indicated the entry as being a non-quota (a type 01) entry, which resulted in the merchandise not being reported at that time for quota. Correctly indicating that the entry was a quota (a type 02) entry was thus a critical component of the entry summary under the circumstances that was reasonably needed for duly ascertaining that the entered merchandise should be reported for quota and receive quota status (see DMV USA, Inc. v. United States, Slip Op. 01–99 (CIT August 10, 2001), Vol. 35 Cust. B. & Dec., No. 35 (August 29, 2001), 46, at 54–55, aff'd., 37 Fed. Appx. 526, 2002 U.S. App. LEXIS 13115 (Fed. Cir. June 5, 2002) (entry summary not in proper form where critical component omitted which was reasonably regarded as necessary to determine entitlement of merchandise to quota treatment)).

Hence, because the entry summary in this case was not presented in proper form when initially submitted to CBP, the subject merchandise was not flagged for quota, and, as a result, did not gain the benefit of quota-class priority and status at that time. Consequently, the merchandise was not entitled to the lower or in-quota rate of duty which was then in effect.

When CBP later discovered the error in the entry summary, the in-quota quantity allowable under the tariff-rate quota had already been reached; as such, CBP was constrained to apply the over-quota rate of duty to the merchandise. To this end, the time that CBP discovered the error in the entry summary constituted the time of proper presentation of the entry summary for quota purposes (see Customs Directive No. 3230–025A, dated May 5, 1999 (paragraph 5.5)).

Against this overall backdrop, therefore, the obligation clearly did not rest upon CBP to find and correct the mistake as to entry type when the entry summary was filed and before the quota was filled, so that the importer could receive the benefit of the in-quota rate of duty then in effect (see also

19 CFR 141.64 (entry/entry summary documentation may be reviewed before acceptance for correctness)). Furthermore, to afford the merchandise the lower or in-quota rate of duty after the quota was filled would occasion the circumvention of the quota in violation of the law inasmuch as a greater amount of merchandise would obtain a lower duty than the quota otherwise permitted (see DMV USA, supra, at 55).

HOLDING:

The imported merchandise was lawfully subject to the over-quota tariff rate under the facts described in this case.

EFFECT ON OTHER RULINGS:

HQ 958810 is REVOKED.

LARRY L. BURTON,
Director,
International Trade Compliance Division.

United States Court of International Trade

One Federal Plaza
New York, NY 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton
Timothy C. Stanceu

Senior Judges

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

Slip Op. 03–125

CEMEX, S.A., PLAINTIFF, v. UNITED STATES, DEFENDANT, AND THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT AND NATIONAL CEMENT COMPANY OF CALIFORNIA, DEFENDANT-INTERVENORS AND CROSS-PLAINTIFFS.

Consol. Court No. 93–10–00659

[Defendant-Intervenors' motion to enforce judgment granted in part, denied in part. Motion for reconsideration denied.]

Dated: September 25, 2003

Manatt, Phelps & Phillips (Irwin P. Altschuler, Jeffrey S. Neeley and Donald S. Stein) for plaintiff.

Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (David S. Silverbrand), Edward N. Maurer, Deputy Assistant Chief Counsel, International Trade Litigation, United States Bureau of Customs and Border Protection, of counsel, for defendant.

King & Spalding LLP (Joseph W. Dorn, Michael M. Mabile and Jeffrey M. Telep) for defendant-intervenors and cross-plaintiffs.

OPINION

RESTANI, Judge:

This matter is before the court on supplemental briefing following the court's opinion herein, Cemex S.A. v. United States, No. 93–10–00659, Slip Op. 03–102 (Ct. Int'l Trade Aug. 12, 2003), finding certain entries to be finally liquidated and not subject to further reliquidation, pursuant to 19 U.S.C. § 1514(a). The court declines to reconsider that opinion as requested by defendant-intervenors based on AK Steel Corp. v. United States, No. 03–00102, Slip Op. 03–116 (Ct. Int'l Trade Sept. 3, 2003), in which entries liquidated in violation of a court order were found to be void liquidations. Here the liquidations did not occur while a court-ordered injunction of liquidation was in effect. Thus, AK Steel is inapplicable.

The court must now determine the proper disposition of two entries not addressed in its August 12, 2003, opinion. First, the one unliquidated Los Angeles entry shall be liquidated at the rate required by 19 U.S.C. § 1516a(e). As noted by the Government, this entry was never liquidated and should now be liquidated properly. As there is no evidence of notice qualifying as sufficient notice for deemed liquidation, liquidation at the proper court-ordered rate shall now take place. The fact that certain Customs officials may have assumed removal of suspension of liquidation, in that some other entries were liquidated, does not establish proper notice of removal of suspension of liquidation for deemed liquidation purposes under the applicable version of 19 U.S.C. § 1504(d).

Next, the El Paso entry has been liquidated. Pursuant to 19 U.S.C. § 1514(a), 90 days after such liquidation it became final. Defendant-intervenors, who as domestic parties have no protest rights, filed a motion to enforce judgment herein within 90 days of the liquidation, but took no other action to suspend the running of the 90 days. Whether or not any relief was available, the simple filing of suit does not alter the fact of liquidation. Further, liquidation did not occur in violation of an injunction. Finally, contrary to defendant-intervenors' argument, the court's order of August 12, 2003, does nothing to alter the fact that public notice of liquidation was posted more than 90 days ago. There was no voluntary reliquidation under 19 U.S.C. § 1501 on August 12, 2003, or earlier, and no equivalent of the same.

Accordingly, the one Los Angeles entry remaining unliquidated shall be liquidated as directed herein. All other relief is denied.

Jane A. Restani
Judge

Dated: New York, New York.
This 25 of September, 2003.

Slip Op. 03–126

ALLEGHENY LUDLUM CORPORATION, AK STEEL CORPORATION, NORTH AMERICAN STAINLESS, BUTLER ARMCO INDEPENDENT UNION, ZANESVILLE ARMCO INDEPENDENT ORGANIZATION, AND UNITED STEEL WORKERS OF AMERICA, AFL-CIO/CLC, PLAINTIFFS, v. UNITED STATES, DEFENDANT, AND ALZ, N.V., DEFENDANT-INTERVENOR.

Before: MUSGRAVE, JUDGE

Court No. 01–01091

[Plaintiffs brought this action challenging (1) Commerce's decision to allow defendant-intervenor to remove its business proprietary information from the record after it decided not to participate in the administrative review in question and (2) Commerce's method of calculating the adverse facts available dumping margin which it subsequently assigned to defendant-intervenor. **Held:** Commerce's interpretation of 19 U.S.C. § 1677f to permit a party to withdraw its proprietary information during the course of the review is reasonable and in accord with the agency's practice. Furthermore, Commerce's decision not to use the public versions of defendant-intervenor's proprietary submissions in calculating the adverse facts available margin because the numbers contained therein were "ranged" plus or minus 10 percent, and were thus inaccurate and unreliable, was supported by substantial evidence and in accordance with law. Therefore, plaintiffs' Motion for Judgment Upon the Agency Record is denied.]

Decided: September 29, 2003

Collier Shannon Scott, PLLC (*David A. Hartquist, David C. Smith, Jr.* and *Adam H. Gordon*) for Plaintiffs.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Ada E. Bosque*), and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Elizabeth Doyle*), of counsel, for defendant.

Shearman & Sterling LLP (*Thomas B. Wilner, Jeffery M. Winton* and *Christopher M. Ryan*) for defendant-intervenors.

OPINION

This action arises from the first administrative review of the anti-dumping order on stainless steel plate in coils from Belgium for the period from November 4, 1998 through April 30, 2000. The United States Department of Commerce, International Trade Administration, ("Commerce") initiated this review on July 7, 2000 upon the request of members of the domestic steel industry including plaintiffs Allegheny Ludlum Corp., AK Steel Corp., North American Stainless, Buter Armco Independent Union, Zanesville Armco Independent Union, and the United Steelworkers of America, AFL-CIO/CLC (collectively, "Allegheny") and defendant-intervenor the Belgian steel company ALZ, N.V. and its affiliated U.S. importer, TrefilARBED, Inc. (collectively, "ALZ").

On August 14, September 5, and September 15, 2000 ALZ submitted both public and proprietary responses to Commerce's antidumping questionnaire and consented to the release of proprietary information pursuant to an administrative protective order ("APO"). Then, on October 5, 2000, ALZ made a timely request for withdrawal from the administrative review pursuant to 19 C.F.R. § 351.213(d) and also requested that all copies of its questionnaire responses be returned or destroyed. Allegheny objected, but on October 27, 2000 Commerce granted ALZ's request. Allegheney requested that Commerce reconsider its decision, but on December 19, 2000 Commerce issued an internal decision memorandum affirming the decision to remove and destroy ALZ's information. Commerce also required Allegheny to destroy its copies of ALZ's proprietary information and any analysis of it. Allegheny then sought a temporary restraining order against this. The court ruled that Commerce could withdraw ALZ's proprietary information from the record, but instead of destroying these documents, the court ordered Allegheny to return its copies of the proprietary information to Commerce where it was to be placed under seal pending the completion of the administrative review and any legal action which might follow.

After ALZ's proprietary information was removed from the record, Commerce proceeded with the administrative review and issued *Stainless Steel Plate in Coils from Belgium; Preliminary Results of Antidumping Duty Administrative Review*, 66 Fed. Reg. 11559 (Feb. 26, 2001), in which it determined that ALZ had failed to cooperate to the best of its ability since it refused to participate in the review. As a result, Commerce calculated ALZ's dumping margin using total adverse facts available, assigning it the highest rate calculated from the petition, 16 percent. Commerce invited Allegheny to submit "public and probative information" for use in calculating the final results. In response, Allegheny argued that Commerce should assign ALZ a 38.90 percent margin using information from the public version of ALZ's proprietary questionnaire responses. Commerce declined to use the information submitted by Allegheny and instead updated the constructed value amount from the petition calculation using publically available information from ALZ's 1998, 1999, and 2000 financial statements. Based on this, Commerce calculated a 24.43 percent margin for ALZ in *Stainless Steel Plate in Coils from Belgium; Final Results of Antidumping Duty Administrative Review*, 66 Fed. Reg. 56272 (Nov. 7, 2001) ("*Final Results*").

There are three issues raised by Allegheny in this action. First, whether Commerce was correct in allowing ALZ to revoke its consent to the disclosure and use of the proprietary information it had placed on the administrative record. Second, if the Court finds that Commerce was correct in allowing ALZ to revoke its consent, whether it was reasonable for Commerce to use a "constructed value to price" methodology to calculate ALZ's total adverse facts available rate. Fi-

nally, if the Court finds this methodology reasonable, whether Commerce should have updated the U.S. price side of the calculation (not just the constructed value side) in order to make them methodologically comparable and consistent. For the reasons which follow, the Court holds that Commerce acted reasonably in permitting ALZ to withdraw its proprietary information from the administrative record and also holds that Commerce's method of calculating the adverse facts available rate for ALZ is supported by substantial evidence and in accordance with law. Therefore, Allegheny's Motion for Judgment Upon the Agency Record is denied.

Standard of Review

The Court shall uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with the law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), and *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). This standard requires "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). In reviewing whether Commerce's interpretation of the antidumping statutes is in accordance with the law, the Court considers "whether Commerce has directly spoken to the precise question at issue," and if not, whether the agency's interpretation is reasonable. *Pesquera Mares Australes Ltda. v. United States*, 24 CIT 443, 444 (2000) (quoting *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984).

Discussion

Regarding the first issue, Allegheny argues that Commerce's interpretation permitting a party to revoke its consent to the disclosure and use of its proprietary information is contrary to other regulations and APO practice, and is therefore impermissible. Mem. of Law in Supp. of Pl.s' Mot. for J. Upon the Agency R. ("Pl.s' Br.") at 13. Specifically, Allegheny cites 19 C.F.R. § 351.306(b) which provides that an authorized applicant may retain proprietary information subject to the APO and may place that information on the record in subsequent administrative reviews if it is relevant to an issue in the later review. *Id.* Allegheny states that in practice Commerce normally permits authorized parties to use business proprietary information in the two consecutive administrative reviews following the

review in which the information was obtained. *Id.* 13–14 (citing *Antidumping and Countervailing Duty Proceedings: Administrative Protective Order Procedures; Procedures for Imposing Sanctions for Violations of a Protective Order*, 63 Fed. Reg. 24,391, 24,398 (May 4, 1998)). Thus Allegheny concludes that it was entitled to retain ALZ's information not only for the review at issue, but also for two subsequent reviews.

Allegheny likens the facts of the present situation to those in *Notice of Final Determination of Sales at Less Than Fair Value: Live Cattle from Canada*, 64 Fed. Reg. 56739 (Oct. 21, 1999) ("*Live Cattle*"), where Commerce denied a request by one of the respondents to withdraw its proprietary submissions on the ground that this would allow the respondent to manipulate the administrative process and prevent an accurate determination of antidumping rates. In *Live Cattle* Commerce limited its investigation to the six largest Canadian cattle producers because the total number of producers was "overwhelming." *Id.* at 56742. On the day Commerce was scheduled to issue its preliminary determination, one of the six producers, Schaus, submitted information that "substantially altered its reported costs." *Id.* Commerce did not have time to incorporate this new information in calculating the preliminary results, but noted that it would likely result in a higher margin. *Id.* Commerce subsequently confirmed that the newly submitted data increased Schaus's dumping margin from 5.43 percent to 15.69 percent. *Id.* Schaus then notified Commerce that it "had decided to decline verification and withdrew all questionnaire responses from the record of the investigation." *Id.* Commerce denied Schaus's request to withdraw its information and amended its preliminary determination, raising Schaus's antidumping rate to 15.69 percent and raising the "all others" rate from 4.73 percent to 5.57 percent." *Id.* at 56743. In the present case, Allegheny alleges that ALZ is similarly manipulating the process to receive a lower rate than it would have received had it cooperated with Commerce during the review. Pl.s' Br. at 19–20.

Commerce asserts that the plain meaning of Section 777 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677f, supports an inference that a party's consent to the release of proprietary information is revocable at any time prior to the conclusion of the proceeding. Def.'s Mem. In Opp'n to Pl.s' Mot. For J. Upon the Agency R. ("Def.'s Br.") at 13. Section 1677f provides in relevant part that "information submitted to the administering authority or the Commission which is designated as proprietary by the person submitting the information shall not be disclosed to any person *without the consent* of the person submitting the information." 19 U.S.C. § 1677f (emphasis added). Commerce argues that "[t]he plain meaning of the word 'consent' suggests that it can be withdrawn." Def.'s Br. at 14. Moreover, Commerce notes that § 1677f is a limited exception to the Trade Secrets Act, 18 U.S.C. § 1905, which generally prohibits an agency

from disclosing business proprietary information. *Id.* at 12. In response to Allegheny's assertion that Commerce's interpretation is contrary to APO practice, Commerce notes that "the APO is not a source of independent authority," but "is a product of 19 U.S.C. § 1677f" and must be interpreted in light of the consent requirement of that statute. *Id.* at 16. Commerce concludes that its established practice — to allow a party to withdraw consent and remove the party's business proprietary information from the record and require other parties to the APO to return or destroy such information — is at least a reasonable interpretation of the statute. *Id.* at 11–12.

Commerce also argues that the present case is distinguishable from *Live Cattle* because it concerns an administrative review rather than a less than fair value investigation, and the removal of ALZ's information did not have an effect on the "all others" rate. Def.'s Br. at 17 (citing Commerce's Issues and Decisions Memorandum (Oct. 24, 2001), Public R. Doc. 52, at 13). Commerce states that *Live Cattle* is the "sole exception to [its] long-standing practice of removing proprietary data from the record upon the withdrawal of consent" and was a "unique situation" which "did not establish 'precedent' for the agency." *Id.* (citing Commerce's Memorandum regarding the Return or Destruction of ALZ, N.V. ("ALZ") Questionnaire Responses and (Dec. 19, 2000), Public R. Doc. 36, and Commerce's Issues and Decisions Memorandum (Oct. 24, 2001), Public R. Doc. 52).

The Court finds that Commerce's interpretation of 19 U.S.C. § 1677f is reasonable. The Court agrees that the "consent" requirement in 19 U.S.C. § 1677f suggests that release of proprietary information is voluntary, and therefore may be revoked. Furthermore, the Court finds Commerce's reasoning in its *Live Cattle* determination noteworthy.

> The Department must balance any potential negative impact that refusing to allow a respondent to withdraw information may have on its ability to obtain business proprietary information in future proceedings, against any negative impact on the integrity of the proceeding if withdrawal is permitted, and determine where the public interest lies.
>
> The Department does not have subpoena power. The submission of information is voluntary. To administer the antidumping law, the Department depends heavily upon the willingness of the parties to provide extensive business proprietary information. As a result, there is a public interest in preserving the trust of companies subject to its proceedings that such information will have limited use and will remain largely within the control of the companies submitting information. However, once a party voluntarily submits business proprietary information in an antidumping proceeding, the submitting party relinquishes some control over the information to the Department.

> For example, after the Department issues a final determination, a submitting party may not withdraw its proprietary information. Once the record of a proceeding is closed, no information may be added to, or withdrawn from the administrative case record.
>
> Equally compelling is the public's interest in the agency enforcing the antidumping law and preserving the integrity of its proceedings. While there is no statutory provision expressly dealing with the withdrawal of business proprietary information once it has been submitted, the courts have recognized "the inherent power of an administrative agency to protect the integrity of its own proceedings." *Alberta Gas Chemicals, Ltd. v. Celanese Corp.*, 650 F.2d 9, 12 [(2d Cir. 1981)]. Thus the agency has the discretion to deny a respondent's request to withdraw information where it is necessary to preserve the fundamental integrity of the process and the remedial purpose of the law.
>
> In practice, the Department has allowed submitting parties to withdraw their business proprietary submissions from the administrative record. [citations omitted] In such cases, the Department bases the company's margin on facts available using an adverse inference where warranted. It is the Department's ability to use adverse facts available that insures that a company will not benefit by a refusal to participate in a proceeding. [footnote omitted] Because investigated companies normally account for substantially all exports to the United States, the elimination of the noncooperative company from the "all others" rate in that situation is likely to be of marginal significance. Thus, the adverse facts available rule normally enables the Department to permit withdrawal of proprietary information while protecting the integrity of the process.
>
> In the present case, however, the adverse facts available rule cannot serve that function. Substantially all future exports of live cattle, which will be subject to the "all others" rate if an antidumping duty order is issued, would inappropriately benefit from Schaus' refusal to participate.

Live Cattle, 64 Fed. Reg. at 56743. As the quoted text demonstrates, *Live Cattle* was a unique situation where the use of adverse facts available could not protect the integrity of the proceedings. Although Allegheny challenges the particular adverse facts available margin Commerce applied to ALZ, it does not argue that the integrity of this review cannot be preserved through the use of adverse facts available. Since ALZ is the only respondent in this review and the "all others" rate will not be affected by its withdrawal, there is no logical reason why an adverse facts available rate cannot serve Commerce's

purposes. Thus the Court concludes that Commerce's decision is both reasonable and in accord with the agency's practice.

Turning to the second issue, Allegheny argues that Commerce erred in determining ALZ's adverse facts available dumping margin by recalculating a prior margin, which was determined through a comparison of constructed value to U.S. price, when it could have used the public information submitted by ALZ to make a comparison of Belgian price to U.S. price. Pl.s' Br. at 22–23. Allegheny notes that, pursuant to Section 773(a) of the Tariff Act of 1930, 19 U.S.C. § 1677b(a)(1)(B), a comparison of home market price to U.S. price is preferred over a constructed value to U.S. price comparison. *Id.* at 27. Allegheny also argues that precedent is found in *Smith Corona Corp. v. United States*, 16 CIT 562, 796 F. Supp. 1532 (1992), where the court permitted Commerce to use the public version of proprietary data, which had been withdrawn, to calculate a dumping margin for the respondent.

Commerce argues that the public information submitted by ALZ in the present action is inherently unreliable because, in accordance with 19 C.F.R. § 351.304(c)(1), the numbers contained in the public versions of proprietary documents are "ranged" plus or minus 10 percent by the party submitting the information. Def.'s Br. at 19. Therefore this information cannot be used as the basis for an accurate "price-to-price" comparison. *Id.* Commerce contends that *Smith Corona* does not support the use of ranged data, and argues that the decision merely upholds Commerce's practice of updating information from the original petition with public information submitted by the respondent to calculate the antidumping margin. *Id.* at 20. In the present case, Commerce argues that it similarly took the petition rate and updated it using ALZ's public financial statements, which it found to be less uncertain than the ranged data. *Id.* at 19–20.

The Court agrees with Commerce. As an initial matter, regarding the precedent established by *Smith Corona*, the issue in that case was whether the respondent retained control over both the proprietary and the public versions of its information, so that the public version could not be used when the proprietary version had been withdrawn. *See* 802 F. Supp. at 468. There is no indication that the accuracy of the public data was raised as an issue. Thus *Smith Corona* is inapposite to the issue presently before the Court.

Commerce is considered to be "in the best position . . . to select an adverse facts rate that will create the proper deterrent to ensure that respondents cooperate with its investigations and to ensure a reasonable margin." Def.'s Br. at 19 (citing *F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)). Nevertheless, its discretion is not without bounds. "An adverse facts available rate must be 'a reasonably accurate estimate of respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.' " *Id.* (quoting *De Cecco*, 216

F.3d at 1032). In this action, it is undisputed that the data in the public versions of ALZ's proprietary questionnaire responses were ranged, and at oral argument counsel for defendant-intervenors demonstrated the high degree of variation in margins that can result depending on the extent to which the numbers used in the calculation are adjusted up or down. *See* Oral Argument Tr. at 37–39. Since these data were, by design, inaccurate, the Court holds that Commerce's decision not to use them in calculating an adverse facts available margin for ALZ is supported by substantial evidence and in accordance with law.[1]

As to the third issue, Allegheny argues that if the Court sustains Commerce's use of updated information from the petition to calculate the constructed value, the Court should also require Commerce to update the net U.S. price to which the constructed value is compared. Pl.s' Br. at 32–33. As this would require Commerce to use the ranged public versions of ALZ's proprietary data, which are inaccurate, to update the U.S. price, the Court holds that this would be unlawful.

Conclusion

For the foregoing reasons, Allegheny's Motion for Judgment Upon the Agency Record is denied and the *Final Results* are sustained.

R. KENTON MUSGRAVE, JUDGE

Dated: September 29, 2003
New York, New York

[1] Allegheny also argues that it is unreasonable for Commerce to assign a 24.43 percent margin to ALZ as adverse facts available when an analysis Allegheny performed on ALZ's proprietary data showed that ALZ's margin of dumping was "in excess of 29 percent." Pl.s' Br. at 25. Commerce rejected the use of this information on the ground that it was impossible to determine the accuracy of Allegheny's calculations since the underlying documents were no longer part of the record. *See* Commerce's Memorandum regarding the Return or Destruction of ALZ, N.V. ("ALZ") Questionnaire Responses and (Dec. 19, 2000), Public R. Doc. 36, at 4–5; Commerce's Issues and Decisions Memorandum (Oct. 24, 2001), Public R. Doc. 52, at 10–11. Since the Court has upheld Commerce's decision to remove ALZ's proprietary information from the record, there is nothing in the administrative record to support Allegheny's allegation that ALZ's actual margin was "in excess of 29 percent."

Slip Op. 03–127

CORUS STAAL BV, AND CORUS STEEL USA INC. PLAINTIFFS, v. UNITED STATES DEPARTMENT OF COMMERCE DEFENDANTS, AND NATIONAL STEEL CORP., BETHLEHEM STEEL CORP., AND UNITED STATES STEEL CORP., DEFENDANT-INTERVENORS.

Before: RESTANI, Judge

Consolidated Court No. 02–00003

JUDGMENT

This case having come before the court for decision on the Remand Determination, consistent with Slip Op. 03-101, entered on August 12, 2003,

IT IS HEREBY ORDERED that the Remand Determination is sustained, as amended on September 2, 2003.

Jane A. Restani

Dated: New York, New York.
This 29th day of September, 2003.

Slip-Op. 03–128

BEFORE: GREGORY W. CARMAN, CHIEF JUDGE

HYNIX SEMICONDUCTOR, INC., HYNIX SEMICONDUCTOR AMERICA, INC., PLAINTIFFS, v. THE UNITED STATES, DEFENDANT, AND MICRON TECHNOLOGY, INC., DEFENDANT-INTERVENOR

Court No. 01–00988

[Plaintiffs' Motion to Strike is denied.]

Dated: September 30, 2003

Willkie Farr & Gallagher (*Daniel L. Porter, Carrie L. Owens*), Washington, D.C., for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigations Branch, Civil Division, United States Department of Justice; *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Ada E. Bosque*, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Patrick V. Gallagher, Jr.*, Senior Attorney, Office of Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for Defendant.

Hale and Dorr LLP (*Gilbert B. Kaplan, Michael D. Esch, Aimen Mir*), Washington, D.C., for Defendant-Intervenor.

OPINION

CARMAN, Chief Judge: Pursuant to Rule 12(f) of this Court and 19 U.S.C. § 1516a(b)(2) (2000), Plaintiffs move to strike three sentences from documents submitted to the Court.[1] One sentence appears in the Final Results of Redetermination Pursuant to Court Remand ("Remand Results") and is a summary of Defendant-Intervenor Micron Technology Inc.'s ("Micron") arguments to the U.S. Department of Commerce ("Commerce"); the other two sentences are in the Reply of Defendant-Intervenor Micron Technology, Inc. to Plaintiffs' Comments on the Final Results of Redetermination ("Micron's Conf. Reply Brief"). Plaintiffs argue that these sentences refer to factual information that is not part of the administrative record. (Pls.' Mot. to Strike at 2.) For the reasons discussed below, this Court denies Plaintiffs' Motion to Strike and will treat the sentences at issue solely as evidence of an argument presented by Micron to Commerce during the Redetermination proceedings and as devices used for the limited purpose of advancing an argument presented by Micron to this Court.

DISCUSSION

As this Court stated in its disposition of a motion to strike filed by Defendant earlier in this proceeding, motions to strike are generally "disfavored" or "extraordinary" remedies. *See Hynix Semiconductor, Inc. v. United States*, No. 01–00988, 2002 Ct. Intl. Trade LEXIS 116, at *3 (Ct. Int'l Trade Sept. 30, 2002); *see also Beker Indus. v. United States*, 585 F. Supp. 663, 665 (Ct. Int'l Trade 1984). "There is no occasion for a party to move to strike portions of an opponent's brief (unless they be scandalous or defamatory) merely because he thinks they contain material that is incorrect, inappropriate, or not a part of the record. The proper method of raising those issues is by so arguing, either in the brief or in a supplemental memorandum, but not by filing a motion to strike." *Acciai Speciali Terni S.P.A. v. United States*, 120 F. Supp. 2d 1101, 1106 (Ct. Int'l Trade 2000) (quoting *Dillon v. United States*, 229 Ct. Cl. 631, 636 (1981)). Nevertheless, this Court has broad discretion in evaluating motions to strike and may grant such a motion "where there has been a flagrant disregard of the rules of court." *Jimlar Corp. v. United States*, 647 F. Supp. 932, 934 (Ct. Int'l Trade 1986).

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[1] Plaintiffs' Motion to Strike asks that two additional sentences appearing in Exhibit 3 of the confidential version of Appendix to Defendant's Response to Plaintiffs' Comments to the Remand Determination ("Def.'s Conf. App.") be stricken. However, Defendant notes that Exhibit 3 in the public version of its appendix is the correct document and a photocopying error resulted in the confidential version of its appendix containing an incorrect document. The Defendant filed a corrected copy of the confidential version of its appendix on August 25, 2003. Thus, Plaintiffs' request to strike the two sentences appearing in Exhibit 3, page 12 and Exhibit 3, page 12, footnote 16 is moot.

The administrative record "for purposes of judicial review is based upon information which was 'before the relevant decision-maker' and was presented and considered 'at the time the decision was rendered.' " *Beker Indus. Corp. v. United States*, 7 Ct. Int'l Trade 313, 315 (1984) (quoting S. REP. NO. 96–249, at 247 (1979)); *see also* 19 U.S.C. § 1516a(b)(2). This Court will not accept new information or evidence to supplement the administrative record, unless exceptional circumstances demonstrate a need to do so. *See, e.g., F. LLi De Cecco Di Filippo Fara San Martino S.P.A. v. United States*, 980 F. Supp. 485, 487 (Ct. Int'l Trade 1997); *Saha Thai Steel Pipe Co. v. United States*, 661 F. Supp. 1198, 1201–02 (Ct. Int'l Trade 1987). However, "a party is 'free to offer whatever *legal* arguments it chooses.' " *Koyo Seiko Co. v. United States*, 955 F. Supp. 1532, 1544 (Ct. Int'l Trade 1993) (quoting *Sachs Auto. Prods. Co. v. United States*, 17 Ct. Int'l Trade 740, 741 (1993)).

Plaintiffs ask the Court to strike the following three sentences: (1) "Micron argues that with the ever-increasing rates of technological development in this industry, the average useful lives of semiconductor manufacturing equipment are decreasing, not increasing." (Def.'s Conf. App. Ex. 1 at 23); (2) "Indeed, with ever-increasing rates of technological development in this industry, the average useful lives of semiconductor manufacturing equipment are decreasing, not increasing." (Micron's Conf. Reply Br. at 18); (3) "In fact, the U.S. Semiconductor Industry Association considers the average useful lives of semiconductor equipment to be 3 rather than 5 years." (*Id.* at 18 n.33 (referencing Statement of Clifford Jernigan on behalf of Semiconductor Indus. Assoc., Test. before the Subcomm.. on Oversight of the House Comm. on Ways and Means, Sept. 26, 2000, "The Tax Code and the New Economy," Printed Hearing No. 106–79, at 46, U.S. Government Printing Office.).) Plaintiffs assert that the information contained in these sentences refers to evidence not on the administrative record. (Pls.' Mot. to Strike at 5.) Plaintiffs contend that it would be improper for the Court to consider these statements. (*Id.*)

Defendant and Micron note that Plaintiffs did not object at the administrative level to the information they now seek to strike. (Def.'s Resp. to Pls.' Mot. to Strike at 2; Def.-Int.'s Opp'n to Pls.' Mot. to Strike at 6–7.) Defendant asserts that the Motion to Strike as pertaining to the sentence contained in the Final Remand Determination is unnecessary because Commerce did not rely on Micron's argument at the administrative level; thus the Court "may simply disregard the sentence, which is not material to Commerce's remand determination." (Def.'s Resp. to Pls.' Mot. to Strike at 3.) Defendant does not take a position regarding the sentences contained in Micron's Reply Brief that Plaintiffs seek to strike. (*Id.*) Micron argues that the motion to strike should be denied because Plaintiffs confuse the record on remand with the original administrative record, and

Plaintiffs have failed to establish that "there has been a 'flagrant disregard for the Rules of this Court.' " (Def.-Int.'s Opp'n to Pls.' Mot. to Strike at 3 (citation omitted).)

This Court finds that the sentences at issue summarize, state, and are argument advanced by Micron. Specifically, the sentence contained in the Remand Results is merely a summary of Micron's argument presented to Commerce during the Redetermination proceedings. The sentence is part of the administrative record insofar as it captures what Micron argued before Commerce. The sentence in Micron's Reply Brief simply states an argument, and the accompanying footnote in Micron's Reply Brief is a reference offered to support the argument advanced by Micron to this Court. The Court notes that Micron included a similarly-worded sentence with the identical citation in its brief in opposition to Plaintiffs' motion for judgment on the agency record. (*See* Br. of Def.-Int. Micron in Opp'n to Pls.' R. 56.2 Mot. for J. on the Agency R. at 43 & n.86.) Plaintiffs have not asked that the information be stricken with respect to its inclusion in Micron's opposition brief. Rather, Plaintiffs addressed Micron's argument and the support in Plaintiffs' reply brief. (*See* Reply Br. of Pls. at 22–23.)

CONCLUSION

This Court holds that Plaintiffs' Motion to Strike is denied, and this Court will consider the three sentences at issue for the limited purpose of advancing an argument.

Gregory W. Carman
Chief Judge

Dated: September 30, 2003
New York, New York

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. / DATE JUDGE	*PLAINTIFF*	*COURT NO.*	*ASSESSED*	*HELD*	*BASIS*	*PORT OF ENTRY & MERCHANDISE*
C03/45 9/24/03 Aquilino, J.	Ohka America, Inc.	94–2–00129	3707.90.30 8.5%	3707.10.00 3%	Agreed statement of facts	Not stated Chemical products
C03/46 9/24/03 Aquilino, J.	Ohka America, Inc.	95–3–00250	3707.90.30 8.5%	3707.10.00 3%	Agreed statement of facts	Not stated Chemical products

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